IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 47.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL., *Appellants*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

No. 48.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SEATRAIN LINES, INC., ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

Brief for The Pennsylvania Railroad Company, et al., Appellants in No. 48, Appellees in No. 47, Plaintiffs in the District Court.

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Brief for The Pennsylvania Railroad Company, et al., Appellants in No. 48, Appellees in No. 47, Plaintiffs in the District Court.

No. 47 is an appeal by the United States of America, the Interstate Commerce Commission, Seatrain Lines, Inc., Forrest S. Smith, Trustee of Hoboken Manufacturers Railroad Company, and The New Orleans & Lower Coast Railroad Company, defendants (R. 148-9), from a final decree of

a specially constituted district court of three judges for the District of New Jersey, entered December 8, 1943 setting aside, in part, an order of the Interstate Commerce Commission dated October 13, 1941 (R. 147-8).

No. 48 is an appeal by the plaintiffs in the District Court, The Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, The Boston and Maine Railroad, Merrel P. Callaway, Trustee of Central of Georgia Railway Company, Great Northern Railway Company, The Long Island Rail Road Company, Louisville and Nashville Railroad Company, Maine Central Railroad Company, Norfolk and Western Railway Company, Northern Pacific Railway Company, Legh R. Powell, Jr., and Henry W. Anderson, receivers of Seaboard Air Line Railway Company, Southern Railway Company, Southern Pacific Company, Texas and New Orleans Railroad Company, Union Pacific Railroad Company, from said decree in so far as it fails to set aside the Commission's order in its entirety (R. 154-6).

Opinions Below

The opinion of the District Court is reported in 55 Fed. Supp. at page 473, and appears in the Record at pages 109 and 141. The report of the Interstate Commerce Commission of October 13, 1941, in Nos. 25728 and 25878, *Hoboken Mfrs. R. Co. v. Abilene & S. R. Co.*, upon which the order of the Commission was made, is reported in 248 I.C.C. 109 (R. 60).

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, Sections 47(a) and 345 of the United States Code, the appeals being from a final decree of the District Court in a case brought to enjoin set aside, annul or suspend an order of the Interstate Commerce Commission, other than

for the payment of money, under Sections 41(28) and 43-48.

Orders allowing the appeals were made on January 28, 1944 and January 31, 1944, respectively (R. 149, 155-6). An order noting probable jurisdiction was made on May 8, 1944 (R. 1378).

Statute Involved

The statute here involved is the Interstate Commerce Act as amended by the Act of September 28, 1940, 54 Stat. L. 899 (49 U.S.C. Sec. 1, et seq.). Sec. 1, paragraphs (1), (2), (3)(a), (4), (10), (11), (13) and (14)(a), and Sec. 302, paragraphs (i), (j), (k) & (l), the paragraphs specially involved, are set forth in the Appendix to this brief at pages i to ix thereof.

Statement of the Case

Proceedings before the Commission and the District Court

This case brings up for review the validity of an order made by the Interstate Commerce Commission in proceedings initiated by the complainants therein (intervener defendants in the District Court), Hoboken Manufacturers Railroad Company (Docket No. 25728), and New Orleans & Lower Coast Railroad Company (Docket No. 25878), and in which Seatrain Lines, Inc., intervened and joined in the prayer for relief (R. 34).

The said complainants sought to have the Commission require railroad companies (including petitioners herein), to permit the delivery of their freight cars by the complainants to, in interchange with, and for use by Seatrain (R. 20), a common carrier by water, on its ocean-going vessels. Seatrain controlled the Hoboken (R. 21, 36), owned no freight cars, and was found to be engaged in transportation by water, between Hoboken, N. J., and

Belle Chasse, La., via Havana, Cuba (R. 37). The Commission made a report (R. 60), finding that a number of railroad companies, including petitioners herein,* had violated Section 1(4) of the Interstate Commerce Act, by refusing to permit the delivery of freight cars owned by them to and for such use of Seatrain Lines, Inc. (R. 71).

After a lengthy and intricate series of reports and orders, see pp. 7-10, *infra*, in which the Commission had entered an order directing the establishment of through routes by certain petitioner railroad carriers with Seatrain (R. 136, District Court Finding 24), the Commission, on October 13, 1941, made the order complained of (R. 73), which is printed in the Appendix hereto (pp. ix-x), and which directs the railroad carriers to permit the interchange of their cars for use in such transportation by Seatrain.

Fifteen railroad companies petitioned the United States District Court for the District of New Jersey to set aside said orders, alleging that the railroads were under no duty to permit the use of their freight cars by Seatrain, or for use in ocean-going vessels, or upon the high seas, or through a foreign country or foreign waters, and that the Commission had no authority to compel them to do so, and also that the order in failing to require observance of its terms by Seatrain, and in fixing the compensation, was based upon a mistake of law and deprived the railroad carriers of their property without due process of law (R. 5-19).

The District Court, sitting as a three-judge Court, decided that the Commission acted within its statutory power in directing the railroad carriers to permit their cars to be used by Seatrain in so far as the routes of Seatrain were within the United States or its territorial waters, but that the order of the Commission was beyond

* For convenience, the said railroad companies will be referred to as petitioner railroad carriers.

the statutory power of the Commission, and based upon a mistake of law in so far as it required petitioners to permit the delivery of their cars to and for the use of Seatrain for transportation beyond the United States and its territorial waters, in extra-territorial waters, or to a foreign port (R. 109-129), and entered a final judgment setting aside the order to that extent only, but refused to set aside the order in its entirety (R. 147). The District Court also rejected the claim of confiscation.

The Facts

The petitioner railroad carriers (appellees in No. 47; appellants in No. 48), common carriers of property by railroad subject to the Interstate Commerce Act, were respondents in the proceedings before the Interstate Commerce Commission in said Dockets Nos. 25728 and 25878, and are parties to the said orders entered by the Commission (R. 130, Finding No. 2). The intervener Seatrain Lines, Inc., is not a carrier by railroad (R. 36) but is a common carrier by water operating ships on the high seas (R. 130, Finding No. 6). The intervener Hoboken Manufacturers Railroad Company is a single-track terminal switching line connected with the piers at which Seatrain ships dock at Hoboken, N. J. (R. 130, Finding No 4). The New Orleans & Lower Coast Railroad Company is a common carrier by railroad, and makes physical connection with the piers at which Seatrain docks at Belle Chasse, La. (R. 130, Finding No. 5). The Hoboken Manufacturers Railroad Company is owned and controlled by Seatrain, and the New Orleans & Lower Coast is an affiliate of Seatrain (R. 130), in that it is financially controlled by the Missouri Pacific Railroad Company, (R. 40) a common carrier by railroad, which is also financially interested in Seatrain (R. 39).

Seatrain operates ships of ocean-going type with four decks, each deck in turn having four sets of standard-gauge railroad tracks.* By means of a special loading device, consisting of an overhead crane which lifts a cradle, loaded freight cars are placed on board Seatrain's ships.

From 1929 to 1932, Seatrain and its predecessor operated ships in foreign service between New Orleans, La., and Havana, Cuba, transporting freight generally in railroad cars, which were delivered to Cuban railroads at Havana (R. 131, Finding No. 8; 641, note, 607, Ex. 100).

On October 6, 1932, Seatrain began operating its service between Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba, after certain of the petitioning railroad companies and others had notified the Hoboken and Seatrain, respectively, not to deliver or use their cars in such Seatrain service (R. 132, Finding No. 10). Such service would not be complementary to but would be in competition with the main line haul of railroad companies. Seatrain's transportation to or from Hoboken or Belle Chasse takes the cars and their contents into the port of Havana, Cuba (R. 130, Finding No. 6).

On November 15, 1932, the American Railway Association promulgated Car Service Rule 4 which had been adopted by its members,† by which cars owned by railroad carriers were not to be delivered to a steamship, ferry, or barge line for water transportation without the permission of the owner (R. 132, Finding No. 11).

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* The manner in which Seatrain operates is described in some detail in *Investigation of Seatrain Lines, Inc.*, 195 I.C.C. 215 (R. 423, et seq.), and in the opinion of this Court in *Interstate Commerce Commission, et al., v. Hoboken Manufacturers' Railroad Company*, 320 U. S. 368.

† All of the railroads involved were members of the American Railway Association and its successor, Association of American Railroads (R. 695-6), and subscribers to the agreement by which they agreed to abide by the Codes of Car Service and Per Diem Rules promulgated by the Association (R. 450).

The Hoboken, in 1932, filed with the Commission a complaint, Docket No. 25728 (R. 20; R. 132, Finding No. 12), entitled "Hoboken Manufacturers Railroad Company *v.* Abilene & Southern Railway Company, et al.", and the New Orleans & Lower Coast Railroad Company filed with the Commission a similar complaint, Docket No. 25878 (R. 132, Finding No. 12), naming as defendants the railroad carriers, including petitioner railroad carriers (R. 132, Finding No. 11). Both complaints alleged that Car Service Rule 4 was unlawful, was and would be in violation of paragraphs (4) and (11) of Sec. 1, and paragraphs (1) and (3) of Sec. 3 of the Interstate Commerce Act, and was also in violation of Sec. 7 of the said Act (R. 26). The complaints were consolidated, and Seatrain intervened with a petition adopting their allegations (R. 132, Finding No. 13; R. 33, 34).*

The defendants before the Commission moved to dismiss the complaints on the ground that the Commission was without authority to grant the relief sought, and was without jurisdiction of the matters complained of (R. 133, Finding No. 13). Testimony was taken, and the examiner issued his report (R. 133, Finding No. 13; R. 620, *et seq.*), in which he concluded that the Commission should find that it had no jurisdiction of the matter in controversy, and that even if the Interstate Commerce Act could be construed as conferring jurisdiction, the rules, regulations, and practices assailed were not unreasonable, prejudicial, or unlawful.

The Commission rejected the conclusions of its examiner and made its report dated February 5, 1935, 206 I.C.C. 328 (R. 35), in which it found that "Seatrain is not a common carrier by railroad or an extension of a line of railroads within the meaning of those terms as used in the act; * * * that it is a common carrier by water

* The complaints before the Commission and its reports are annexed as exhibits to the petition to set aside the order of the Commission (R. 20, 33-73).

• • •" (R. 35, 36); that Seatrain's vessels were designed primarily for the handling of railroad cars in non-break-bulk transportation; that Seatrain had been able to establish through routes between Hoboken and points in the Southwest via the lines of the Missouri Pacific, of which Lower Coast is a wholly-owned subsidiary (R. 40), and its subsidiary Texas & Pacific and some of their short line connections (R. 50), and that both of those railroad companies had a direct and active interest in the operation of Seatrain; that Seatrain's transportation was competitive with that of those railroad companies (R. 40-42). The Commission also stated that it had jurisdiction to require the establishment of through routes between rail and water carriers and, where such through routes* are established, to require the rail carriers to interchange cars with the water carrier (R. 51). The Commission stated, however, that it could not determine on the record what through routes existed, and that said issue was pending undetermined in Docket No. 25727 (R. 50). Accordingly, the Commission, on February 5, 1935, dismissed the complaints without prejudice to the filing of a petition for further consideration after it had decided whether through routes existed and, if not, whether they should be established (R. 53).

On January 28, 1938, the Commission made an order in No. 25727 directing the petitioner railroad carriers to establish through routes and joint rates for combined rail and water service between railroad stations in eastern, southern, and south-western portions of the United States reached via Hoboken, N. J., and Belle Chasse, La., via Havana, Cuba. 226 I.C.C. 7 (Petition, Par. XV, R. 11); 237 I.C.C. 97, 99 (R. 57).

Through routes were established as prescribed, and

* A through route is a route by which a shipment may be sent from a point on one line to a destination on another line without any intervention by the shipper. *Memphis Freight Bureau v. Ft. Smith & Western R. R. Co.*, 13 I.C.C. 1, 8.

certain of petitioner railroad carriers were compelled to participate therein.*

Seatrain and the complainants in Nos. 25728 and 25878, in July, 1938, moved before the Commission for an order requiring the defendants therein, including the petitioner railroad carriers, to permit their cars to be interchanged with and used by Seatrain in its said service (R. 136, 137, Finding No. 25).

On November 21, 1938, the Commission reopened these dockets "for further hearing to determine upon what terms and conditions (including compensation) defendants should be required to interchange their cars with intervener Seatrain Lines, Inc." (R. 137, Finding No. 26). The Commission made two reports on these further hearings, the first on January 8, 1940, 237 I.C.C. 97 (R. 137, Finding No. 26; R. 55), and the second on October 13, 1941, 248 I.C.C. 109 (R. 137, Finding No. 27; R. 60), and on the latter date entered the final order complained of (R. 73).

By its said order of October 13, 1941 (R. 73; Appendix, p. ix), the Commission directed, in effect, that the railroad carriers permit the delivery of their freight cars to the Hoboken and the Lower Coast, for interchange with and use by Seatrain in its ocean-going vessels between Hoboken, N. J., and Belle Chasse, La., which route was via Havana, Cuba, and that the railroad defendants therein observe and enforce rules, regulations, and practices with respect to such interchange of freight cars, corresponding to the current Code of Per Diem Rules as observed by the railroads among themselves, including the rate of $1.00 per car per day, provided, however, that such per diem should be payable by Seatrain, not from the time the cars are made available as is required of the railroads *inter sese*, but only for such periods as the cars should be in its actual

* Through routes exist between various railroad carriers and certain break-bulk water lines. *Seatrain Lines, Inc.* v. *Akron, Canton & Y. R. Co.*, 226 I.C.C. 7, 12.

possession. The order made no direction that Seatrain observe the rules and regulations, or the terms of the order, or return the cars directed to be turned over to it, or that it should become responsible for the payment of the compensation, and petitions (R. 1340, 1355, 1358) to reconsider and modify the order and compel it to do so were denied by the Commission (R. 74).

In view of this appeal, the effective date of the order has been postponed to March 15, 1945 (R. 1380).

The Commission based its order on the finding that petitioner railroad carriers had violated "Section 1(4) of the Interstate Commerce Act by refusing to agree to the interchange of freight cars owned by them with complainants, for delivery to Seatrain for use in interstate commerce between points in the United States" (Commission Finding No. 4, R. 71). The Commission refused to find that other sections had been violated (R. 50, 70, 71).

It is to be noted at the very outset, that since 1920, Section 1(4) has contained no reference to interchange of cars, Appendix p. iii. On this issue Commissioner Caskie, in 237 I.C.C. 97, 102* (R. 60) had, with the concurrence of Commissioner Alldredge, dissented and had referred to his prior dissent in 226 I.C.C. 7,† in which he said at p. 40:

> "The provisions of the Car Service Act, approved May 20, 1917, and amended February 20, 1920, by its terms are specifically confined to carriers by railroad. It is this act which gives us authority to require the interchange of cars between railroads and to fix the compensation to be paid for their use. Although this act was passed about five years after the enactment of section 6(13)†† no such authority was given us as to rail and water carriers. * * * We cannot compel the carriers to furnish cars to the Seatrain in the absence of an agreement without providing compensation

* *Hoboken Mfrs. R. Co.* v. *Abilene & S. R. Co.*

† *Seatrain Lines, Inc.* v. *Akron, Canton & Y. R. Co.*

†† Panama Canal Act, see p. 23, *infra*.

for their use. The act does not specifically give us such authority. If we have it, it is because it necessarily flows from the power to require the interchange of cars, which in turn must necessarily flow from the jurisdiction to prescribe through routes, or expressed otherwise, it is a power implied from another implied power.

"In my opinion if the Congress had intended to confer such broad and important powers on us, it would not have clothed its intention in obscurity and left it to be evolved by doubtful implications and disclosed by construction, but would have explicitly declared it."

Specification of Assigned Errors To Be Urged*

The District Court erred:

(1) In not setting aside, annulling and enjoining, in its entirety, the Commission's Order of October 13, 1941, involved in this case.

(2) In not setting aside, annulling and enjoining the Commission's said Order in so far as the said Order required the railroad petitioners to permit the use of their cars by Seatrain Lines, Inc. (hereinafter referred to as "Seatrain"), a carrier by water.

(4) In concluding and holding as a matter of law that the Commission acted within its statutory power in requiring the railroads petitioners to permit the use of their cars by Seatrain in so far as such transportation is within the United States or its territorial waters.

(5) In concluding and holding as a matter of law that the Commission did not base its decision upon a mistake of law to the extent that it held that the railroads petitioners were under a duty to permit their cars to be used by Seatrain on any through routes existing or pre-

* (R. 156-162).

scribed by the Commission in so far as such through routes are within the United States or its territorial waters.

(6) In concluding and holding as a matter of law that the Commission, in requiring the railroads petitioners to permit the use of their cars by Seatrain, a carrier by water, did not exceed the authority conferred upon it by statute.

(9) In not setting aside, annulling, and enjoining the Commission's said order to the extent that it requires the railroads petitioners to cease, desist and abstain from observing and enforcing their rules, regulations, and practices which prohibit the interchange of their freight cars for transportation by Seatrain.

(10) In not setting aside, annulling, and enjoining the Commission's said order to the extent that it requires the railroads petitioners to establish, observe, and enforce rules, regulations and practices with respect to the interchange of their freight cars for transportation by Seatrain.

(24) In failing to conclude and hold that the findings of the Commission in respect to the compensation to be paid by Seatrain for the use of petitioners' cars was without adequate evidence to support it, and in holding and concluding to the contrary.

(25) In failing to hold and conclude that the Commission's conclusion of law in respect to the compensation to be paid by Seatrain for the use of petitioners' cars was without adequate evidence to support it and in holding and concluding to the contrary.

(26) In failing to hold and conclude that the rate of compensation to be paid by Seatrain for the use of petitioners' freight cars at $1.00 per day for such period only

as the cars were in Seatrain's actual possession was confiscatory.

(28) In failing to conclude and hold that the Commission's said order in finding that the compensation to which petitioners are entitled for the use of their freight cars by Seatrain is only $1.00 per car per day payable only for the time that the cars are in Seatrain's actual possession, denies to each of the petitioners the just compensation to which each is entitled and deprives each of them of the use of its property without due process of law and in violation of the Fifth Amendment to the Constitution of the United States.

(30) In failing to hold and conclude that the Commission's said order is arbitrary, capricious, and unwarranted in law in that it does not run against or impose any obligation upon Seatrain with respect to its use of the cars of petitioners herein, and the said order fails to direct Seatrain to make any payment therefor.

(34) In failing to conclude and hold that the railroads petitioners were entitled to just compensation for the use of their cars to be determined and paid or adequately secured by Seatrain before or at the time they were required to interchange their cars with Seatrain.

We also rely upon Assignments Nos. 3, 7 and 8, which are supplemental to Nos. 1, 2, 4, 5 and 6, and on Nos. 11 to 23, inclusive (R. 157-161), 27 29, 31, 32, (R. 161-162) and 33, which relate to the unreasonableness and confiscatory effect of the order, are supplemental to Assignment 24, et seq., quoted above, and are voluminous because of the form and nature of the Commission's "findings". For the convenience of the Court, they are further referred to in connection with the appropriate points of the argument.

Summary of Argument

The District Court properly held that the order of the Interstate Commerce Commission is erroneous and beyond the lawful authority of the Commission in so far as it directs railroad carriers to permit the interchange of their freight cars with or for the use of Seatrain Lines, Inc., for transportation beyond the United States and its territorial waters, in extra-territorial waters, or to a foreign port, but the judgment of the District Court in failing to set aside the order in its entirety was erroneous, for the following reasons:

1. The Interstate Commerce Act creates no duty on the part of carriers by railroad to furnish their cars for transportation on the ships of a carrier by water such as Seatrain, and confers no authority upon the Interstate Commerce Commission to compel railroad carriers to perform any such alleged duty. That Congress did not intend to, and did not, create such duty or confer such power is shown by the phraseology of the provisions of the Interstate Commerce Act, by the lack of express provision for such duty or power, by the detail in which Congress enumerated the duties imposed upon the carriers and the powers granted to the Commission, and by the history of the Act.

2. Independently of the foregoing, the provisions of the Interstate Commerce Act, requiring carriers by railroad to furnish or to interchange cars, are expressly limited to transportation which takes place within the United States, and, therefore, do not require railroad carriers to furnish cars for transportation by Seatrain on ships which go outside of the United States. As transportation by Seatrain invariably goes beyond the United States, the petitioner railroad carriers should not be compelled to establish

observe and enforce rules, regulations or practices for transportation by Seatrain upon non-existent routes, on the hypothesis, which has no basis in the record, that Seatrain may at some future time operate occasionally within territorial waters.

3. The order by requiring railroad carriers to permit the delivery of their freight cars to Seatrain, without providing adequate protection for their return and compensation for their use by an enforceable order directed against Seatrain, deprives the railroad carriers of their property without due process of law within the meaning of the Fifth Amendment. Moreover, the Commission adopted the railroad Code of Per Diem Rules, including the rate of $1 per car per day, as providing the reasonable rental for the use of the cars compelled to be delivered to Seatrain, and then denied to the railroad carriers the right to charge Seatrain for a substantial part thereof. Finally, even if the said carriers were permitted to charge the full amount so determined, the rate as fixed by the Commission as the maximum that may be charged by said railroad carriers for the use of their cars by Seatrain, is less than the cost of car ownership. Thereby, the Commission has failed to require the reasonable compensation prescribed by the Interstate Commerce Act and the property of the petitioner railroad carriers is taken without just compensation in violation of the Fifth Amendment to the Constitution.

ARGUMENT

I. The railroad carriers are under no duty to deliver their freight cars for the use of, or to interchange their cars with, Seatrain Lines, Inc., a water carrier, for use in ocean going vessels on the high seas, and the Commission has no authority to direct the railroad carriers to perform any such alleged duty.

The phraseology of the car service provisions of the Act, the detail with which Congress has enumerated the duties of railroad carriers and the authority of the Commission to enforce such duties, the history of the Act, and the express limitations contained therein, all show an utter lack of intent on the part of Congress to impose a duty upon railroad carriers to interchange freight cars with or furnish freight cars for use by water carriers in ocean-going ships upon the high seas and the Commission was without statutory authority to enforce such alleged duty.

A. The Interstate Commerce Act does not impose a duty upon railroad carriers to interchange their freight cars for use in ocean-going ships upon the high seas by a water carrier, and does not confer authority upon the Commission to compel such an interchange.

The Commission was unable to support its finding that such a duty exists by any express provision of the Act; it relied upon an implication from the provision, first introduced by the Hepburn Amendment of 1906, and now in Sec. 1 (4), which required railroad carriers to establish through routes with other carriers, including certain water

carriers (R. 61-2). The Commission reasoned that this statutory duty carries with it the duty to interchange cars; that, as through routes may be established with water lines, as well as with other rail lines, the railroads are under an implied duty to interchange cars with both railroad carriers and water carriers as an incident to the establishment of through routes; and further, that such implied duty of the railroad carrier implies in turn, power in the Commission to compel such interchange. *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328, 341-342, (R. 35, 48, 49).*

The Commission recognized that, although Congress had made specific provisions with respect to "car service", no support for its findings could be obtained therefrom as those provisions are expressly confined to carriers by railroad; so neither the asserted duty of the railroad carriers nor the claimed power was found by the Commission to be in the car service provisions. Sec. 1(10), (11) and (14)(a), Appendix pp. v-vii.†

The District Court seems to have followed the Commission in basing the asserted duty of railroad carriers to supply cars for the use of water carriers upon the duty

* This is the first time that the Commission has found it a duty for railroad carriers to interchange cars for transportation by a water carrier. No question of interchange of cars was involved in the cases mentioned in the Commission's report (R. 48). *Pennsylvania Co. Operation of Transportation Co.*, 34 I.C.C. 47; *Grand Trunk Ry. Co. of Canada Operation of Car Ferry Co.*, 34 I.C.C. 49; *Buffalo R. & P. Ry. Co. Operation of Car Ferry Co.*, 34 I.C.C. 52; and *Grand Trunk W. Ry. Co. Operation of Car Ferry Co.*, 34 I.C.C. 54.

† The Commission said (R. 47, 49):

"• • • These car service provisions, by their terms, apply only to 'carriers by railroad subject to the Act.'"

"• • • the Act of February 28, 1920 also amended the car service act so as to provide that the provisions thereof should apply only to railroads • • •"

to establish through routes imposed by Sec. 1(4). (R. 119, 120).*

Unlike the Commission, however, the District Court was apparently of the opinion that the Commission's power was dependent on the car service provisions. So, in finding authority in the Commission, the District Court said (R. 120):

> "* * * Subsection (11) provides that it shall be the duty of 'every carrier by railroad' subject to part I to furnish car service. The subsection is notably silent in that it does not state to what carriers (subject to part I) the rail carriers shall supply car service * * *."

The silence referred to would in itself be significant in establishing that Congress did not intend to include carriers by water. Indeed, the Court in the quoted language indicates a realization that the subsection cited relates only to such carriers by water as are subject to Part I of the Act. When paragraph (11) is read in connection with the definition of car service in paragraph (10), it appears that Congress was not silent.

1. *The Phraseology of the Car Service Provisions.*

These car service provisions, with paragraphs (13) and (14)(a), exclusively prescribe the duty of the carriers and the power of the Commission with respect to the interchange of freight cars. By paragraph (10), "car service" is defined as "the use, control, supply, movement, distribution, exchange, interchange, and return

* The Commission and the District Court in finding that Sec. 1(4) now imposes a duty to interchange cars, failed to note the distinction between car service—the interchange of cars by railroads under Sec. 1(10) and (11)—and transportation service under Sec. 1(4), pointed out by Mr. Justice Brandeis in *Peoria Railway Company* v. *United States*, 263 U. S. 528, where, speaking for this Court, he said (at p. 533): "But 'car service' connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them."

of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part". Cars are thus placed in the category of "vehicles", a word defined by statute, as including all means of land transportation.* Irrespective of the foregoing statutory definition, this Court, by Mr. Justice Holmes, said with respect to the meaning of the word "vehicle":

> "* * * in every day speech 'vehicle' calls up the picture of a thing moving on land." *McBoyle* v. *U. S.*, 283 U. S. 25, 26.

In the use to which the Commission has endeavored to compel the petitioner railroad carriers to devote their cars, i. e., one of repose on ocean-going ships, the car is obviously not "moving" and certainly not "on land".

Moreover, the definition of "car service" shows that Congress was legislating with respect to transportation on land or transportation incidental thereto. It includes, and is limited, paragraph (19), to:

> (a) The "use * * * of locomotives, cars, and other vehicles * * *, by any carrier by railroad subject to this part". By limiting the "use" to "any carrier by railroad", as well as by placing "cars" in the category of a conveyance for "transportation on land", the use of such vehicles by water carriers for ocean transportation is definitely excluded.

* Rules of Construction, 1 U. S. C. Sec. 4: "'*Vehicle*' *as including all means of land transportation.* The word 'vehicle' includes every description of carriage or other artificial contrivance used or capable of being used, as a means of transportation on land". Compare with 1 U. S. C. Sec. 3: "'*Vessel*' *as including all means of water transportation.* The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

(b) The "exchange" and "interchange" of such locomotives, cars and other vehicles, etc., "by any carrier by railroad subject to this part". Here carriers by water are excluded for the same reasons as in the preceding paragraph. Furthermore, mutual duties and obligations are imposed. When the Act provides for "exchange" and "interchange" by carriers by railroad, it is obvious that both parties thereto are to be carriers by railroad.

(c) The "return" of cars "by any carrier by railroad". The fact that Congress thus limited the Commission's jurisdiction over the return of cars to the return "by any carrier by railroad", shows clearly that Congress never intended a compulsory interchange of cars with water carriers for ocean transportation. There is no provision in the Act empowering the Commission to compel a water carrier to return cars. It is inconceivable that Congress authorized the Commission to direct the railroads to hand their cars over to water carriers, and at the same time withheld from the Commission power to compel the return thereof by such water carriers while conferring authority with respect to the return by railroad carriers. Yet Sec. 1(10) specifically limits "return" to the act of a carrier by railroad.

(d) The "control, supply, movement, distribution" of "locomotives, cars, and other vehicles * * *" and "the supply of trains, by any carrier by railroad". Clearly, this does not apply to transactions with carriers by water.

Furthermore, by Sec. 1, par. (14)(a), the authority conferred upon the Commission over car service is limited to authority over railroad carriers, and par. (11) imposes the duty only on railroad carriers.

In accordance with the usual rules of statutory construction, the express provisions prescribing the duty of the railroads and defining the power of the Commis-

sion, (14)(a), with respect to the "use", "exchange", "interchange" and "return" of cars and other vehicles, preclude the implication of any duty or power beyond the Congressional grant.*

This Court has refused to impose duties on carriers or to permit the Commission to exercise powers based upon implication where specific provisions with respect to related matters are contained in the statute. When it was urged that emergency "power to require switching should be held to be granted by implication", Mr. Justice Brandeis in *Peoria Ry. Co.* v. *I. C. C.* (1924) 263 U. S. 528, writing for a unanimous court, analyzed the car service provisions which contained the Commission's emergency powers, Sec. 1 (15) and (16), and said at p. 532:

> "* * * The specific grant, in paragraph 16 of emergency power to 'make such just and reasonable directions with respect to the handling, routing and movement of the traffic of such carrier and its distribution over other lines of roads', and the omission of any reference to switching, tend to rebut an intention to grant the power here asserted."

He said, further, pp. 534, 535:

> "Transportation Act 1920 evinces, in many provisions, the intention of Congress to place upon the Commission the administrative duty of preventing interruptions in traffic. But there is no general grant of emergency power to that end; and the detail in which the subjects of such power have been specified precludes its extension to other subjects by implication."

This Court has held that there were no general or implied powers in the Commission to order a railroad company to provide special cars. In *United States* v. *Pennsylvania Railroad Co.*, (1916) 242 U. S. 208,* it

* See also *Palmer* v. *Massachusetts* (1939) 308 U. S. 79 at pp. 83-84; *Joseph Goldberg Realty Co.* v. *N. Y. C. & St. L. R. Co.* (1938) 229 I.C.C. 497.

refused to find authority implied in the statute for the Commission to direct a railroad carrier to furnish tank cars, described by the Court as a combination of "package and car", p. 229. The Court reviewed the history of the statute, considered the amendments thereto, which it emphasized had been drawn and recommended by the Commission, and used the following language which *mutatis mutandis* is equally pertinent to the case at bar, p. 231:

> "Of course, if there is a duty upon a carrier to furnish tank or other special cars upon request, its enforcement cannot be arrested by the burden it imposes; but here again the thought obtrudes, which we have already expressed — it may be to tiresome extent — that if Congress had intended such consequence with all that it implies of expense, directly and indirectly, it would not have left its intention to be evolved from obscure language but would have put it in explicit declaration and with notice and time for accommodation to it."

Sections 12 and 15 of the Act, upon which Congress had relied in the above case for its asserted power, remain, so far as material, unchanged. When Congress subsequently intended to require railroad carriers to acquire special types of equipment, it did so by specific enactment, Sec. 1(10) and (21). Had Congress intended to impose an obligation and confer authority for the enforcement thereof, such as the Commission has asserted in the instant case, so important a purpose would not have been left to inference.

2. *The Enumeration by Congress of Specific Duties and Powers.*

With respect to the acquisition of equipment and its use by others, Congress has recognized the need enunciated by this Court of employing specific and not general terms, and has formed its legislation accordingly. For example, by Sec. 1(9), Congress expressly imposed the

duty upon railroad carriers to construct and maintain switches, connections with lateral branch lines, or side tracks and to furnish cars for the movement of traffic thereon, and conferred power on the Commission to compel compliance. By the Panama Canal Act, Sec. 6(13) of I.C.A. as amended 1920, now Sec. 6(11), I.C.A., Congress extended benefits to certain water carriers to the limited extent of authorizing the Commission to require a railroad carrier to make connections between its line and the docks. By Sec. 1(13) and (14)(a), Congress conferred upon the Commission power to compel railroad carriers to furnish car service as defined in Sec. 1(10); by Sec. 1(12), Congress imposed the duty on railroad carriers to make reasonable distribution of cars for the transportation of coal from the various mines; by Sec. 1(15), Congress conferred emergency power on the Commission with respect to car service; by Sec. 1(19), Congress conferred power on the Commission over the abandonment of tracks or portions thereof; by Sec. 1(21), Congress authorized the Commission to direct railroad carriers to acquire cars; by Sec. 3(5), Congress authorized the Commission to compel carriers by railroad to use the same terminals upon the stated terms and conditions; by Sec. 25, Congress conferred authority upon the Commission to compel railroads to install block systems, automatic devices, etc. Other examples show the practice of Congress to be specific in conferring authority. Thus, by Sec. 1(16), Congress authorized the Commission to reroute traffic in emergencies; by Sec. 15(5), Congress conferred upon the Commission power to prescribe rules for loading and unloading livestock at the stockyards; by Sec. 15(10), Congress authorized the Commission to direct the routing of traffic under certain conditions.

The enumeration by Congress of these specific powers of the Commission, rebuts any intention to extend by a grant of general powers the specific and limited authority to compel railroad companies to interchange cars. Clearly,

Congress has not permitted such duties or powers to rest in implication. There is, accordingly, neither duty imposed upon railroad carriers to interchange cars with water carriers nor authority conferred on the Commission to compel them to do so.

The District Court in the instant case referred to the duty to furnish "facilities", and to the fact that freight cars have sometimes been referred to as facilities of carriage (R. 120). But freight cars have never been considered facilities of carriage on ocean going ships, and the definition of facilities for water carriers, Sec. 302(g), does not include freight cars or other vehicles.

This Court, as previously noted, (pp. 21-2, *supra*), described a tank car as a combination of "package and car". As proposed to be used by Seatrain, the cars are not even such a combination. They become mere packages or shipping cases.* Seatrain is asking that the railroad carriers furnish the package in which the commodity of the shipper is to be transported on ocean-going vessels.

In somewhat analogous cases, the Commission has recognized that there was no duty to furnish cars for such purposes, even where a water carrier is not concerned. Thus, it was determined that a railroad carrier had no duty to furnish cars for storage or warehouse purposes, *Pittsburgh & Ohio Mining Co.* v. *Baltimore & O. R. Co.*, 40 I.C.C. 408; *Wilson Produce Co.* v. *Pennsylvania R. Co.*, 16 I.C.C. 116; *F. M. Turnbull Co.* v. *Erie R. Co.*, 17 I.C.C. 123; *Andrews Bros. Co., Inc.* v. *Pennsylvania R. Co.*, 123 I.C.C. 733; or for use as a place for peddling to the public. See *The Car Peddling Case*, 45 I.C.C. 494. *A fortiori* it is no part of the carrier's duty to furnish freight cars to rest passively as shipping cases in the hold or upon the deck of a water carrier. The petitioning rail-

* They were so characterized in the dissent of Commissioners Mahaffie and McManamy, 226 I.C.C. at p. 39, and also by Seatrain (R. 522).

road companies have never held themselves out to perform such services, or to furnish cars as part of the cargo of ocean-going vessels.

Moreover, the history of the Act demonstrates conclusively that Congress never intended that railroad carriers should be compelled to interchange cars with carriers by water for use on ocean-going ships, and that no such duty can be implied either from the obligation to establish through routes or from the requirement "to provide reasonable facilities for operating such routes."

3. The History of the Act.

Discussion of the evolution of the requirement for the interchange of cars may appropriately be introduced by a condensed statement of the various successive steps, as follows:

(1) At common law a carrier was not required to permit its cars to go beyond its own lines.

(2) The original Interstate Commerce Act of 1887 imposed no such obligation.

(3) The Hepburn Amendment of 1906 required all carriers subject to the Act to furnish transportation, including cars and other facilities, and to establish through routes and reasonable rates applicable thereto, I.C.A. Sec. 1(4),* and it also gave the Commission power to establish through routes and maximum joint rates provided that no satisfactory through route existed and the provision of the section was also to apply "when one of the connecting carriers is a water line" subject to the Act, *id.* Sec. 15(3). It contained no provision with respect to interchange of cars.

* The section numbers mentioned in the history of the Act were not in the amendments prior to 1920, but refer to the appropriate sections of the Interstate Commerce Act as amended by the Transportation Act of 1920. See Appendix for pertinent parts of the statutes.

(4) The Mann-Elkins amendment of 1910 required carriers to furnish transportation and to establish through routes and reasonable rates and also (a) to provide reasonable facilities for operating such through routes, and (b) *to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein.* I.C.A. Sec. 1(4). The power of the Commission with respect thereto, Sec. 15(3), remained substantially unchanged.

(5) The Esch Car Service Act of 1917 required car service, including "the movement, distribution, exchange, interchange and return of cars", to be provided "by any carrier subject to the provisions of this Act."

(6) The amendment of 1920 omitted from Sec. 1(4) the provision requiring the making of "rules and regulations with respect to the exchange, interchange and return of cars used therein" and amended the Car Service provisions so as to add to the definition of "car service" the italicized words and to omit the bracketed words, viz: "* * * *the use, control, supply,* movement, distribution, exchange, interchange and return of *locomotives,* cars, *and other vehicles* used in the transportation of property, *including special types of equipment, and the supply of trains,* by any carrier *by railroad* subject to [the provisions of] this Act." I.C.A. Sec. 1(10). The authority of the Commission over car service was likewise limited to railroad carriers. *id.* Sec. 1(14).

(7) The Act of 1940 made no substantial changes in the car service provisions, which were expressly made applicable only to a "carrier by railroad subject to" Part I of the Act. I.C.A. Sec. 1(10), *et seq.*

It is thus seen that the interchange of cars was dealt with as an obligation separate and apart from the duty to furnish facilities; that the provision with respect to the interchange of cars, Sec. 1(4), inserted by the Mann-

Elkins Act of 1910, was subsequently omitted from that section, where the provisions for through routes and reasonable facilities remained, and that the interchange of cars was dealt with solely in the car service provisions which were limited to railroad carriers.

The foregoing, we submit, demonstrates that Congress has at all times considered the obligation to furnish car service as separate from and not included in either the duty to establish through routes or the duty to provide reasonable facilities for operating through routes; that car service is to be furnished only to the extent required by the car service provisions, Sec. 1(10), *et seq.*; and that these provisions apply only to transactions by and between carriers by railroad subject to Part I of the Act.

It is appropriate that we consider at greater length the statutory developments outlined above.

At common law, a carrier was not bound to permit its cars to go beyond its own line or to interchange cars with another carrier. See *Atchison Topeka & Santa Fe R.R. Co.* v. *Denver & New Orleans R.R. Co.*, 110 U.S. 667, 680-3 (1884); *Southern Pacific* v. *Interstate Com. Com.*, 200 U.S. 536, 553-4 (1906); *Atlantic Coast Line* v. *Riverside Mills*, 219 U.S. 186, 197 (1911).

The Interstate Commerce Act, as originally enacted in 1887, 24 Stat. L. 379, did not impose any obligation upon the railroads either to establish through routes or to exchange or interchange cars. There may be applied to this situation, by the substitution of obvious equivalents, the language of Mr. Justice Field, when, as a Circuit Justice, he passed upon the question whether an interchange of cars was required by the act of Congress granting a charter to the Northern Pacific Company. He there said:

> "Whenever an intention has been manifested, in the creation of railway charters, that a connecting company shall have the power to run its cars over

> the lines of another, or to require one company to haul over its line the cars of another, such intention has been expressed in unequivocal terms, such as is found in the constitutions or statutes of several of the states respecting railway companies, which is substantially in these terms: 'And they shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination.'" *Oregon Short Line* v. *Northern Pacific R. Co.*, (1892) 51 Fed. 465, 475.*

In the face of this prior decision of Mr. Justice Field that duties, such as the Commission in the instant case held were imposed by implication (R. 48, 49), are created only by unequivocal and specific language, Congress in 1906 adopted the Hepburn Amendment with no provisions as to such duties or as to power to enforce them if they existed.

By the Hepburn Act, 34 Stat. L. 584, 1906, there was added a provision, later incorporated in Sec. 1 (3) and (4), imposing a duty upon carriers to provide transportation, defined as follows (Sec. 1 of Hepburn Act):

> "* * * the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership * * *".

It is clear that "facilities" as there used, was not intended to include "cars and other vehicles" which were separately particularized. The amendment imposed the further duty on carriers subject to the provisions of the Act

> "to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

* Compare *Central Stockyards Company* v. *Louisville & Nashville Ry. Co.*, (1904) 192 U. S. 568, with *Michigan Central Railroad Co* v. *Michigan Railroad Comm.*, (1915) 236 U. S. 615.

By the same amendment, the Commission was given power, 34 Stat. L. 590 Sec. 4, see Sec. 15(3) of present I.C.A., "to establish through routes" and to prescribe "the terms and conditions under which such through routes should be operated", provided that no reasonable or satisfactory through route existed; and this provision was to apply "when one of the connecting carriers is a water line".

Although it is upon the Hepburn amendment that the Commission now bases both the duty and the authority (R. 48, 49), the Commission at that time recognized that these provisions did not require any interchange of cars with railroads. Interchange of cars with water carriers was, as far as appears, not even imagined. This recognition, involving an obvious construction of the then existing law, is important in that although the Hepburn Act required railroads to furnish "facilities" and to provide through routes, this was not then considered to require an interchange of cars.

Shortly after the passage of the Hepburn Act, the Commission stated, both in its 1906 Annual Report to Congress and in a report, *Matter of Car Shortage*, 12 I.C.C. 561, that the Commission did not have the power to compel carriers to make reasonable rules and regulations with respect to the interchange or return of cars. The Commission was concerned perhaps more with its lack of power to compel the return to the owners of cars voluntarily exchanged, than with its want of authority to require the interchange. The Commission pointed out that certain carriers had been in the habit of reloading for use on their own lines, cars received from other roads. The result was that, instead of bringing about an uninterrupted flow of traffic, the free interchange of cars had resulted in their withdrawal from through transportation for local use on the foreign line.*

* By foreign line is meant a line other than that of the owner.

In its 1906 Annual Report, the Commission reviewed the facts with respect to the then existing car shortage and the retention of cars owned by other railroads, and said (p. 17):

> "It is scarcely necessary to point out that the Commission is without authority under any existing law to deal effectively with this condition. Broadly speaking, the regulating power of the Congress has not been exercised to control the physical operations of interstate railroads—aside from the safety appliance requirements—either as respects the movement of trains or the supply of equipment. It is true that the recent amendments [Hepburn Act] include a very broad definition of 'transportation' and impose in general the obligation to provide all needful facilities, but this is perhaps not much more than a statement of common law obligations which already existed. * * *"

Later, in 1907, the Commission said in *Matter of Car Shortage*, 12 I.C.C. 561, 578, that it should

> "be empowered to make rules under which free interchange of cars shall be effected or to require railroads engaging in interstate commerce to make such rules for their own protection and provide for their enforcement."

Further, at p. 579, the Commission said:

> "Such legislation without providing also for the compulsory interchange of cars would tend to compel carriers to keep all their cars on their own tracks in order to avoid demurrage penalties, and thus break up the advantages now enjoyed by shippers of through transportation."

It appears from the foregoing that the Commission was then asserting its lack of power to compel the interchange of cars, although the existing statute, Hepburn Act, 34 Stat. L. 584, Sec. 1, made it the duty of carriers to

establish through routes and empowered the Commission to establish such routes. The ensuing amendments (see pp. 35-7, *infra*) which gave the Commission power to compel the interchange of cars by some carriers, those by railroad, furnish a construction by Congress itself that the prior existing provisions did not embrace such power. See *Peo. ex rel. Westchester F. I. Co.* v. *Davenport*, 91 N. Y. 574, 591. The present insistence of the Commission that it has "power to enforce rules relating to the interchange of cars (which) necessarily flows from the carriers' duty to establish through routes" (R. 48) is diametrically opposed to its previous construction, acquiesced in by Congress.

As a result of the recommendations of the Commission, the Mann-Elkins Act, 36 Stat. L. 545 (1910), amended the Hepburn Act, see Sec. 1(4) of present I.C.A., so as to read as follows, the italicized portions being added by the Mann-Elkins Act, Sec. 7:

> "* * * and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; *and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.*" (Emphasis supplied).

It should be noted that although the Mann-Elkins Act for the first time imposed a statutory duty on carriers to make rules and regulations with respect to the exchange, interchange, and return of cars used in through routes, it did not in express terms direct carriers to interchange cars.* In form, at least, it only required the railroads to

* There may be through routes without interchange of equipment. *Seatrain Lines Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I.C.C. 7, 12; *Through Routes and Joint Rates*, 153 I.C.C. 129, 135.

make reasonable rules and regulations with respect thereto. It is also to be noted that the providing of "facilities" and the making of rules for the "exchange, interchange, and return of cars" were dealt with as separate and distinct obligations. The latter was not included in the former. This will be further demonstrated when we consider the 1920 amendment, wherein the duty to establish through routes and to furnish facilities for operating them remained in Sec. 1(4), while the provision respecting interchange of cars was enlarged upon and placed in Sec. 1(10) to (14).

The important fact is that the Hepburn Act of 1906, imposed a duty to provide facilities and to establish through routes, but, as the Commission, contrary to its present claim, then recognized, did not impose a duty to, or confer authority on the Commission to compel, interchange of cars. It was only after the 1910 amendment, enacted at the Commission's request, added the above provision for rules and regulations for the interchange and return of cars, that the Commission said in *Missouri & Illinois Coal Co. v. Illinois Central R. R. Co.*, (1911) 22 I.C.C. 39, at p. 49, that the "carriers must make reasonable rules and regulations with respect to the exchange, interchange and return of cars used upon their through routes and for the operation of such through routes (Section 1) * * *". The Commission in that case relied (p. 45) largely upon the provisions of the amendment, requiring rules for interchange of cars, in reaching its decision that the carriers should not establish an embargo. Even then the Commission did not attempt to enforce its opinion by an order which could be reviewed. On the contrary, it expressly left the matter to the railroad carriers "to make such regulations for car inter-

change and for the maintenance of through routes involved as may be needed" (p. 49).

The 1910 amendment still did not, in the opinion of the Commission, clearly impose a duty to interchange cars nor grant sufficient power to compel such interchange. When the recurrent problem of the return of cars to their owners arose again at the outbreak of the First World War, the Commission recommended to Congress that it be given definite and specific authority to prescribe car interchange rules, particularly governing the return of interchanged cars. In its 1916 Annual Report, dated December 1, 1916, the Commission referred to the above amendment and to its power to prescribe through routes and joint rates and said (pp. 73-4):

> "* * * We recommend that the Commission be given definite and specific authority to prescribe for the carriers by rail subject to the Act, rules and regulations governing interchange of cars to the owning road, the conditions and circumstances under which such cars may be loaded on foreign roads and the compensation which carriers shall pay to each other for the use of each other's cars."

This recommendation shows that the Commission did not consider that it had the authority to compel the interchange and return of cars. In *Car Supply Investigation*, 42 I.C.C. 657, (1917) the Commission recognized the limitation of its authority, but held, three of seven commissioners dissenting, that it had authority to modify car service rules theretofore promulgated by the American Railway Association so as to effect a more prompt return of cars to their owners. The question of compulsory interchange was not involved. The Commission again recommended that it be given definite and specific authority to

prescribe rules and regulations governing the interchange of cars."

* At the hearings before the Subcommittee on Interstate Commerce, United States Senate, 65th Congress, First Session (May 3, 1917) on S. 626, preliminary to the enactment of the Esch Car Service Act of 1917 (Senate Library Vol. 120 No. 5), Hon. Frank H. Funk, Commissioner of State Public Utilities Commission of Illinois and Chairman of the Committee on Car Service and Demurrage, National Association of Railway Commissioners of the various state commissions, referring to *Car Supply Investigation*, 42 I.C.C. 657, which had as its principal purpose to relieve "the carriers who are wrongfully deprived of the use of their cars" (id. p. 674) made the following statement (p. 18):

> "Commissioner McChord I believe, will admit that the order [requiring the establishment and observance of car service rules found reasonable by the Commission] that he issued in the coal car investigation in Louisville last November was issued without any warrant of law but he got by with it; he arbitrarily did it. He told me that—I do not know that I am authorized to quote him, but it is a fact—he told me that complaint was made. He was criticized that he had nothing back of him on which to issue the order, and he said 'Gentlemen, I have the public opinion of 100,000,000 people who will support this order.'"

At similar hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives (February 1, 9 and 13, 1917) on H.R. 19546, H.R. 20256, H.R. 20352, preliminary to the enactment of the Esch Car Service Act, Commissioner Henry Clay Hall of the Interstate Commerce Commission explained the request of the Commission as follows (p. 24):

> "* * * *We do not here ask any power to require the furnishing or supplying of cars, however proper* and *appropriate* that might or might not be. We are talking of exchange interchange, and return; we say that there should be *rules which mean something*, that they should not be changed except as tariffs are changed and that they should be subject to the determination of the Commission as to whether they are just and reasonable. And then to meet the cases of emergency which will arise we propose this amendment to which I was about to call your attention." (Emphasis supplied).

To the same effect see the comments of Commissioner Aitchison in Interstate Commerce Acts Annotated, Vol. 1, p. 83; 1 *Sharfman*, "The Interstate Commerce Commission", Part I, pp. 145-146, particularly Note 17.

These hearings and the debates hereinafter referred to are presented to show the evil aimed at, and the environment at the time of the enactment. They may properly be consulted for that purpose. The *Tap Line Cases*, 234 U. S. 1, 27; *Seven Cases* v. *U. S.*, 239 U. S. 510, 515; *Helvering* v. *Griffiths*, 318 U. S. 371.

The recommendations of the Commission were incorporated in the Esch Car Service Act, 40 Stat. L. 101 (1917), hurriedly drawn for World War I and enacted substantially in the form recommended. 1917 Annual Report, p. 65. This statute added the first definite car service provisions to the Act. The term "car service" was defined to include "the movement, distribution, exchange, interchange and return of cars used in the transportation of property by any carrier subject to the provisions of this Act." A duty was imposed upon the carriers subject to the Act to "establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service", and the Commission was given authority to establish such rules.

Preparatory to the return of the railroads to their private owners, the Transportation Act of 1920, 41 Stat. L. 474, made various changes in the car service and through routes provisions. For the first time, Congress in express terms imposed a duty on railroad carriers to "furnish" car service,* that duty being expressed as follows: "It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service." Sec. 1 (11). At the same time "car service" was by definition, extended to include "use, control and supply" as well as "movement, distribution, exchange, interchange and return" and the activities, which so far as previously specified had related only to "cars", were made to include "locomotives, cars, and other vehicles used in the transportation of property, including special types of equip-

* This distinction between the Transportation Act of 1920 imposing a duty upon railroads to "furnish" car service including interchange of cars with each other, and the provision in the Mann-Elkins Act of 1910 carried through the Esch Car Service Act to make reasonable rules and regulations where cars were being interchanged, was pointed out by Hon. C. B. Aitchison, a member of the Commission, in 5 George Washington Law Review (1937) 289, pp. 368-9.

ment, and the supply of trains". The phrase "by any carrier subject to the provisions of this Act" was amended to read "by any carrier by railroad subject to this Act". Sec. 1(10); see page 26, *supra*. It was thus made clear that the duty of the railroads and the powers of the Commission with respect not only to the "exchange, interchange and return", but also to the "use" of cars and other vehicles was subject to the limitation that such use, exchange, interchange or return was by a carrier by railroad. This limitation had been carefully considered in drafting the statute.

When the act, H.R. 4378, 66th Congress, 1st Session, MacVeagh, Transportation Act of 1920, pp. 517, 518, was first introduced on June 2, 1919, the definition of "car service", Sec. 1(10), provided for the use, exchange, interchange return, etc. "by any carrier subject to this act", while Sec. 1(11) imposed the duty to furnish car service upon "every carrier by railroad subject to this act".

This bill, providing for the "use" and the "return" of cars by any carrier subject to the Act, was reintroduced and finally enacted after substituting in paragraph 10 "any carrier by railroad subject to this Act" for "any carrier subject to this Act", so that the said sections, as finally enacted, read as follows:

> "(10) The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act."
>
> "(11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

At the same time the power of the Commission with respect to car service—that is, the use, interchange and return of cars—was limited in the grant by Congress to authority over railroad carriers by paragraphs (13) and (14). (See Appendix, pp. vi, vii).

At the same time the provision of the Mann-Elkins Amendment of 1910 imposing the duty upon any carrier subject to the Act "to make reasonable rules and regulations with respect to the exchange, interchange and return of cars", was dropped from Sec. 1(4) leaving both the duty of interchange and the authority over the same, wholly in the car service provisions of the Act, Sec. 1(10)-(14).

Nevertheless, in the instant case, the Commission and the District Court have held that this clause relating to "exchange, interchange and return" of cars which had been so withdrawn from Sec. 1(4) should still be read into that section by implication and, as so read in, should be free of the limitations to carriers by railroad only. After referring to the elimination of the said provision from Sec. 1(4), the Commission said: "While the Act of February 28, 1920 also amended the car service act so as to provide that the provisions thereof should apply only to railroads, such amendment did not lessen the duty of the railroads with respect to car service which had been imposed upon them prior to such amendment." 206 I.C.C. 342, (R. 49).

It would be strange, indeed, after the Commission had, since 1906, repeatedly requested authority to compel the return of cars to their owners, if, in 1920, Congress had conferred authority on the Commission, which it had not requested, to compel railroad carriers to hand their cars over to a water carrier for ocean transportation, and had at the same time denied to the Commission authority to compel the return of the cars by the water carrier. In other words, upon the Commission's interpretation,

Congress granted authority, which had not been sought, and refused to confer the power which had been requested. That was exactly what was accomplished, if the present views of the Commission and the District Court prevail, as paragraphs (13) and (14)(a) of Sec. 1 expressly limit the authority of the Commission with respect to car service to authority over carriers by railroad, and as paragraphs (10) and (11) likewise limit the duty to return cars. Furthermore no other section of the Act confers authority upon the Commission to compel any carrier to return cars.

In recognition of its lack of power the Commission has directed the railroads to deliver their cars to Seatrain but has not directed Seatrain to return the cars.

This leads to a further reason for not attributing to Congress the intent to require railroad carriers to provide cars for ocean going vessels. Had it so required, without, at the same time, providing for compulsory return thereof to the owners, and it cannot be denied that no such provision was made in the act, the Federal constitution would have been violated. See *Louisville & Nashville R. R. Co. v. Central Stock Yards Co.* (1909), 212 U. S. 132; *Grand Trunk Ry. Co. v. Michigan R. R. Com.* (1913), 231 U. S. 457, at p. 470.

Additional facts evidence the lack of Congressional intent to compel railroads to permit their cars to be loaded aboard ocean going vessels. In adopting the 1920 amendment, Congress was not unmindful that extra hazards were involved in transportation by water. Sec. 20(11), providing that the initial carrier should be responsible for any damages to the freight by a connecting carrier, expressly limited the liability with respect to cargo damaged by a water carrier to that which could be recovered from the water carrier, thereby giving full consideration to the limitation of liabiltiy under the admiralty law. However, Congress made no provision for

protection of a railroad carrier for loss of or damage to its freight cars by a water carrier. Surely, Congress did not intend to compel a railroad, against its will, to subject its property to such incidents of maritime transportation as limitation of liability, or contribution to special or general average, or to salvage claims. These matters would certainly have been provided for if Congress had intended that the railroad carriers could be compelled to provide the freight cars to be interchanged with and used as containers for the benefit of the water carriers.

The Transportation Act of 1940, 54 Stat. L. 898, recast, amended and added to the Act. The provisions with respect to railroads were placed in Part I, those with respect to motor carriers in Part II and those with respect to water carriers, newly enacted, in Part III. The duties of and authority over railroads must now be found in Part I exclusively. The car service provisions, Sec. 1(10), (11), (13) and (14)(a)*, were not changed in any pertinent respect although their exclusive application to railroads was emphasized by being made applicable only to a "carrier by railroad subject to this part", instead of to a "carrier by railroad subject to this Act". There was added to Sec. 1(4) the duty of railroads to establish through routes with water carriers subject to Part III of the Act, and a reciprocal duty on water lines was imposed by Part III, Sec. 305 of the Act, but no provision was made for the exchange and interchange of cars by railroad carriers and water carriers. By Sec. 305(a) common carriers by water were required to furnish "transportation" which, so far as material, means by definition, Sec. 302(g)(h), "any vessel, warehouse, wharf, pier, dock, yard, grounds, or any other instrumentality or equipment of any kind used in or in connection with transportation by water subject to this part"; Sec. 15(3) was amended so as to give the Commission also the power to establish either maximum or minimum rates where one of the participants

* "(14)" in the 1920 Act.

in the through routes was a common carrier by water subject to Part III.

It is to be noted that when Congress intended Part I, as amended in 1940, to apply to carriers by water it specifically so provided not only by so stating in the particular section of Part I, see, for example, Sec. 3(4) and Sec. 4, but also when appropriate, by inserting a provision for correlative duty or power in Part III, see, for example, Sec. 1(4) and 305(b); Sec. 3(4) and 305(i); Sec. 1(1) and (2) and Sec. 302(i) (2) and (3).

Nowhere, prior to the adoption of any of the amendments or Acts heretofore considered, had it been suggested either by the Commission or in the Committee reports or in the Congressional debates, that railroad carriers should provide freight cars for use on ocean-going vessels of carriers by water.

By the terminology of the car service provisions, by the history of the Act, by the enumeration of the Commission's powers, and the classification of cars as contrivances for transportation on land, it is clearly shown that in providing for the "use, exchange, interchange, and return of locomotives, cars and other vehicles", by railroad carriers, Congress was providing for transportation on land and not for transportation on the high seas.

B. Seatrain Lines, Inc., is a Carrier by Water Whose Ocean-Going Vessels are Engaged in Transportation on the High Seas.

The Commission found "that Seatrain is not a common carrier by railroad or an extension of a line of railroad within the meaning of those terms as used in the act; that it is a common carrier by water." (R. 36. See also District Court Finding No. 6, 130.)

The definition of a railroad includes "all bridges, car floats, lighters and ferries used by or operated in connection with any railroad, * * *." Sec. 1(3)(a).

Seatrain's ships "are oceangoing vessels" which ply the high seas, 195 I.C.C. 215-221. This is not in dispute. As the District Court stated (R. 121), the testimony of Graham M. Brush, president of Seatrain, made the character and scope of Seatrain's operations very plain.*

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* Mr. Graham M. Brush, president of Seatrain, testified as follows (R. 210):

"You must realize that Seatrain ships are seagoing vessels. They can operate around the world, they can operate through any kind of weather. * * * Comparing our ships with the ordinary type of car ferry, those vessels were not designed to go on ocean voyages. * * * * it would just be impossible to compare a car ferry in the usual trade route with a Seatrain vessel; the car ferry, in our opinion, would only run a short time before it would be lost, the same as a car float."

Mr. Brush further testified (R. 583):

"Q. Your ships are now operating in what service or in what services, Mr. Brush?

"A. Our present operation is from New York to Havana, thence to New Orleans, returning from New Orleans to Havana to New York; the ships leaving New York and clearing for the foreign ports, entering Havana and again clearing from Havana for a foreign port.

"Q. What is the length of the voyage from New York to Havana?

"A. In time the voyage is three and a half days under the present operating schedule from New York to Havana, a distance of approximately 1200 nautical miles.

"Q. And from Havana to New Orleans?

"A. From Havana to New Orleans the running time is approximately two days, a distance of 600 nautical miles.

"Q. In those voyages do your ships go out to sea?

"A. Yes, sir. * * *"

For the distinction between a ferry and an ocean-going ship, see also *Puget Sound Nav. Co. v. U. S.*, 107 F. (2d) 73; cert. den. 309 U. S. 668; *Canadian Pac. Ry. Co. v. U. S.*, 73 F. (2d) 831, 835.

C. Since Congress did not impose a duty upon carriers by railroad to interchange cars for use upon the high seas by carriers by water, nor confer authority upon the Commission to enforce any such alleged duty, and since Seatrain Lines, Inc., is a carrier by water engaged in such transportation and not a carrier by railroad, the order directing the railroad carriers to interchange cars with Seatrain should be set aside in its entirety.

The Commission erroneously held that petitioner railroad carriers had violated Sec. 1(4) of the Act in refusing to grant permission for the interchange of cars for Seatrain's use. The District Court erred in its conclusions of law Nos. 2 and 3, whereby it sustained the power of the Commission to require railroads to permit the use of their cars by Seatrain insofar as such transportation is within the United States or its territorial waters, and held that the Commission did not base its decision upon a mistake of law in holding that the rail carriers were under such a duty (R. 140). The order should have been set aside in its entirety.

II. The District Court correctly held that the order of the Commission is based upon a mistake of law in that in making it the Commission assumed erroneously that the petitioners were under a duty to permit the interchange of their cars with and for the use of Seatrain for transportation beyond the United States and its territorial waters, in extra-territorial waters, or to a foreign port, and that the order is beyond the statutory power of the Commission in so far as it requires an interchange of cars for such use, but the District Court erred in failing to set aside the order in its entirety.

It appears without dispute that Seatrain carries the cars on ships plying from or to Hoboken, N. J., to or from Belle Chasse, La., operating by way of Havana, Cuba. (R. 130, 131; see also p. 41, note, *supra*), and invariably going out to sea in the course of their voyages. (R. 129, note; 141, note 1.)

The Commission has sought to compel the railroads to interchange their cars for use in such transportation. Ever since the enactment of the Transportation Act of 1920, 41 Stat. L. 474, paragraph (1) of Sec. 1 has expressly made the Act (or after the Amendment of 1940, part I thereof) applicable to carriers by railroad engaged in transportation between states or territories from one place in the United States through a foreign country to another place in the United States, or between the United States and a foreign country, "but only in so far as such transportation takes place within the United States."* Paragraph (2) of Sec. 1 similarly limits the application of the Act to "such transportation" as takes place within the United States. Not only the terminology of paragraph (1)

* This precise limitation was first expressed in the Transportation Act of 1920, and was coincidental with, if not a result of, the careful revision of Sec. 1, pars. (10) and (11), directing railroad carriers to furnish car service.

but the restriction in paragraph (2) shows clearly that the limitation applies to all such carriers by railroad and to all such transportation. Speaking of the limitation, this Court has said: "The Act extends to transportation only in so far as it takes place in this country." *St. Louis, etc., Ry. Co.* v. *Brownsville District*, (1938) 304 U. S. 295 at p. 300. Accordingly the provisions of the Act as it was prior to 1940 applied to the carriers, Sec. 1(1), and to the transportation, Sec. 1(2), only in so far as the transportation takes place within the United States. These provisions were continued in the Transportation Act of 1940 which added Part III, with similar limitations with respect to transportation partly by water and partly by railroad. By Section 302 (i)(2) and (3), Part III applies to such transportation partly by rail and partly by water "from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, * * * [it] shall include transportation by railroad or motor vehicle only in so far as it takes place within the United States * * *". It applies to transportation "from or to a place in the United States to or from a place outside the United States, * * * only (A) insofar as such transportation by rail or by motor vehicle takes place within the United States, * * *", and (B) to movements to a foreign place only in so far as the water transportation takes place prior to the transshipment at a place within the United States for movement to a place outside thereof, with a similar limitation in the case of incoming foreign movements to the domestic portions thereof. By subdivision (j) the term "United States" means "the States of the United States and the District of Columbia". By subdivision (l) "The term 'common carrier by railroad' means common carrier by railroad subject to the provisions of part I".

The limiting provisions of the Act of 1920, thus carried into and emphasized by the Act of 1940, make it plain that Congress did not intend to empower the Commission to compel railroad carriers to provide cars for transportation by water carriers in extra-territorial waters. By Sec. 1 (14), 1920 amendment, authority was conferred upon the Commission to make rules with respect to the use, exchange, interchange and return of cars by railroads subject to the Act, constituting "car service" as defined in paragraph (10) of said section, including compensation for the use of cars. These provisions were continued by the 1940 amendment, the words "this part" being substituted for "this Act". The conclusion of the District Court was therefore, necessarily, that there was no duty or authority with respect to furnishing cars for transportation outside of the United States, or in extraterritorial waters, foreign waters or to a foreign port.

The Commission had sought to justify the asserted power to compel interchange of cars by the proposition that it "necessarily flows from the carriers' duty to establish through routes", 206 I.C.C. 328, (R. 48), as provided by Sec. 1(4) of the Act. Subsequently recognizing the limitations imposed upon that paragraph by the provisions of paragraphs (1) and (2) of Sec. 1, the Commission, 226 I.C.C. 7, 13-16, was compelled to seize upon the provisions relating to the establishment of through routes contained in the Panama Canal Act, then Sec. 6(13) of the Act,* which provided in part that

> "when property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, * * * the Interstate

* This provision of the Panama Canal Act, 37 Stat. L. 560, enacted August 24, 1912, became Sec. 6(13) (a), (b), (c), and (d), of the Transportation Act of 1920, but the Transportation Act of 1940, repealed subparagraph (b), upon which the Commission relied, and the other provisions became Sec. 6(11) of the Act. 54 Stat. L. 898.

> Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act * * *:
>
> "(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced."

By laying hold of such general language, the Commission sought to free itself from the jurisdictional restraints.

If these provisions can be given any effect in sustaining the Commission's self-asserted power, which we deny, it can only be on the assumption that the Commission had authority to determine the terms and conditions under which through routes with Seatrain should be operated by virtue of said subparagraph (b), *supra*, and that such power was "in addition to the jurisdiction given by the Act," and that by reason thereof the limitations of paragraphs (1) and (2) of Sec. 1 did not apply.

But when in 1941 the report was made directing the interchange of cars with Seatrain, said subparagraph (b) had been repealed by the Act of 1940, 54 Stat. L. 898, and the only duty with respect to the establishment of through routes was to be found in Sec. 1(4) and by no pretense involved any jurisdiction over railroad carriers in addition to that given by Part I. Nevertheless, when the foregoing was urged upon the Commission, it chose to regard the 1940 Act, and its repeal of subparagraph (b) of Sec. 6(13) "as confirming our jurisdiction in the present premises, as Congress reenacted Sec. 1(4) with no material change in wording, presumably with full knowledge of the interpretation of that section followed in our first report in these proceedings" (R. 62).

It was in this manner that the Commission sought to justify the exercise of an extraordinary power, and to bring about by indirection a result which Congress had refused and, it is submitted, intentionally refused to accomplish by specific enactment.

As stated above, the Commission, in 1938, had cited the Panama Canal Act as its authority to compel the interchange of cars with Seatrain for use without the United States, 226 I.C.C. 14. Thereafter, in 1939, in the first session of the 76th Congress a bill to amend the Interstate Commerce Act generally was introduced in the Senate, S. 2009,* which, if enacted, would have legitimized the proposed action of the Commission, as far as territorial jurisdiction was concerned. By this bill the territorial limitation both as to railroad carriers and water carriers was to apply to foreign commerce only, Sec. 2(1)(a) and (b), defined as commerce from a point in the United States to a point in a foreign country, Sec. 3(30) thereof, but no territorial limitation was imposed upon transportation in interstate commerce, Sec. 2(1)(a) thereof, which was defined as follows in paragraph (29) of Section 3 thereof:

> "The term 'interstate commerce' means transportation of passengers or property by a carrier or carriers, from a place in one State, Territory, or possession to a place in another State, Territory, or possession of the United States (*another such transportation be wholly within the United States or through a foreign country or by way of a foreign port or waters or the high seas*), or between places in the same State by a route or routes passing beyond the borders of said State, or between places in the same Territory, and includes the use of any and all instrumentalties and facilities embraced in paragraphs (23) and (26) of this Section." (Emphasis supplied.)

* S. 2009 was introduced in the Senate by Senator Wheeler, chairman of the Committee on Interstate Commerce, on March 30, 1939. A similar bill, H. R. 4862, was introduced in the House by Mr. Lea, chairman of the Committee on Interstate and Foreign Commerce, on March 8, 1939.

The proposed bill would have extended the application of the Act and the power of the Commission over railroad carriers and railroad transportation beyond the territorial limits of the United States, over the high seas, through foreign waters, and by way of a foreign port. It is to be noted in this connection that the authority was not only to be thus expanded, but also extended to cover transportation to and from insular possessions of the United States, not comprehended in the Transportation Act of 1920.

Congress rejected the bill, and thereafter adopted the Transportation Act of 1940, continuing the existing territorial limitations, Sec. 1(1)(2), and adding other similar provisions, Sec. 302(i)(2) and (3), heretofore considered (p. 44, *supra*). It also repealed subparagraph (b) of paragraph (13) of Sec. 6, thereby relegating all requirements for the establishment of through routes to Sec. 1(4).

With regard to the Commission's claim of obtaining the asserted power by the reenactment of Sec. 1(4) it is to be remembered that since 1920 that section had contained no reference to the interchange of cars, such provision by and after the 1920 amendment being solely in the "car service" sections applicable only to carriers by railroad, Sec. 1(10)-(14). The "reenactment" in 1940 made no change in this respect. It is to be noted further that, to this stage of the proceeding, the Commission had never relied upon Sec. 1(4) as the source of any jurisdiction over railroad transportation upon the high seas or beyond the territory of the United States. The assertion of such reliance was in the report of October 13, 1941 (R. 62, 71).

Even had the Commission, prior to the reenactment of Sec. 1(4) by the Act of 1940, construed Sec. 1(4) as implicitly giving it the extraterritorial jurisdiction it claimed, such construction would have been clearly erroneous. This Court has held that the reenactment without alteration of a section of the Interstate Commerce Act was not an adoption of an erroneous construction of such section

by the Commission even in a long line of decisions, *U. S.* v. *Mo. Pac. R. Co.*, 278 U. S. 269 (1929), and *a fortiori* "one decision construing an act does not approach the dignity of a well settled interpretation." *White* v. *Winchester Country Club*, 315 U.S. 32.

It has been authoritatively determined that railroad carriers are not required to interchange cars for transportation beyond the United States.

In *St. Louis etc. Ry. Co.* v. *Brownsville District*, (1938) 304 U. S. 295, the Court held that the District Court had properly refused to compel a railroad carrier to furnish cars for transportation of freight between the Port of Brownsville, Texas, and Matamoras, Mexico, and held (at p. 300) that the railroad carrier was not bound to deliver cars in the United States to another railroad carrier for transportation into Mexico.*

The Commission itself has repeatedly held that it does not have jurisdiction to establish through routes and prescribe joint rates between carriers with respect to transportation from a point in the United States through a foreign country to another point in the United States. *San Diego Chamber of Commerce* v. *A. & V. Ry. Co.*, 102 I.C.C. 27, 28, 29 (1925); *Cyanamid & Cyanide from Niagara Falls*, 155 I.C.C. 488, 490 (1929); *J. R. Clogg & Co.* v. *Railway Express Agency*, 215 I.C.C. 15, 17 (1936); *Great Northern Railway Co. Abandonment*, 202 I.C.C. 703, 707 (1935); *Lake & Rail Class & Commodity Rates*, 205 I.C.C. 101, 177, 178 (1935); *Hy Grade Food Products Corp.* v. *Wabash Ry. Co.*, 227 I.C.C. 306 (1938).

By its order (R. 73) the Commission has directed the railroad carriers to deliver their cars for transportation,

* The fact stated in the opinion, 304 U. S. at p. 298, was that any delivery of cars by the Missouri Pacific Railroad Co. to the Port Isabel Ry. Co. would be made in the United States, for the reason that the Port Isabel Railway Company's line extended from Port Isabel, Texas, to the tracks of the Missouri Pacific in Brownsville, Texas.

not only upon the high seas and beyond the territorial limits of the United States, but upon a route through foreign waters and on ships that dock at a foreign port. Moreover, as the Commission states, Seatrain moves "a very substantial number of empty cars, routing them preferably via Havana, in the hope that there they may pick up loads" (R. 65). Such cars will thereby enter Cuban commerce. The vessels and their contents are thereby made subject to attachment or libel, and to seizure, not only by process of the United States Courts, but also by a foreign sovereignty, in which event the rights of the American owners can be asserted only through foreign courts or through the diplomatic department of our government. See *Ricaud* v. *American Motor Company*, (1918) 246 U. S. 304, 310.

The effect of the Commission's decision is that it has the power to compel a railroad carrier to deliver its freight cars to and for the profit of and use by a water carrier on a route, let us say for illustration, from New York over the Atlantic Ocean, through the Mediterranean, the Suez Canal, the Red Sea, the Indian Ocean, across the Pacific Ocean to San Francisco, stopping at various points en route. See R. 210, where Seatrain's president testified that its vessels can operate around the world.

Yet the Commission admits "that we have no power to make a finding which directly or indirectly would require defendants to turn over their cars to complainants for use by Seatrain in its Cuban traffic" (R. 59, 70, 71). In the face of the statutory provisions limiting its territorial jurisdiction the Commission by its order has arrived at this astonishing result: Although it cannot compel a railroad to send its cars out of the country, and cannot compel a water carrier to send its ships to a foreign port, yet when

a water carrier voluntarily sends its ships through foreign waters docking at a foreign port, the Commission can compel the railroads to allow their cars to be placed on the ships which are engaged in such transportation. The statement of this result affords a refutation of the grounds upon which it rests.

It is evident that the order entered by the Commission is calculated, if sustained, to accomplish a result which Congress has steadily refused to accomplish by direct legislation. The District Court correctly reached the conclusion that Congress did not intend to confer such power on the Commission (R. 140), but in setting aside the order only in part, has left the petitioner railroad carriers under compulsion to establish, observe and enforce some kind of rules, regulations and practices with respect to the interchange of cars with Seatrain to meet the contingency that Seatrain may at some time establish a route which would be within the Commission's territorial jurisdiction—a contingency contrary to existing facts and improbable of eventuation.*

Upon the decision of the District Court (R. 140) the order should have been set aside in its entirety.

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* The court in its main opinion said it "* * * can see no practical way in which Seatrain can operate its ships between Hoboken and Belle Chasse without going outside of the territorial waters of the United States." (R. 129, note.)

On argument with respect to the form of final decree, Seatrain suggested that it "might be able to maintain routes from Hoboken to Belle Chasse entirely within the United States and its territorial waters." The court said "That there is no evidence in the record from which an opinion in respect to this question can be formed. Navigation maps and similar documents of which we may take judicial notice seem to indicate that such routes would be impractical." (R. 141, note.)

III. The order of the Commission requiring the railroad carriers to deliver their freight cars to Seatrain makes no provision directing Seatrain to return the cars or to pay for their use or to provide other adequate compensation. The compensation to which the railroads are confined is inadequate. The order therefore fails to comply with the Congressional mandate, is arbitrary, unjust and unreasonable in its consequences, and deprives the railroad carriers of their property without due process of law and without just compensation, in violation of the Fifth Amendment.

A. The provisions in the order requiring railroad carriers to permit the delivery of their freight cars to Seatrain, without providing adequate protection for their return or compensation for their use, amounts to a taking of property without due process of law within the meaning of the Fifth Amendment.

Assignments of Error Nos. 14, 30 (R. 158-9, 162)

The order does not contain any direction against Seatrain (R. 73-74). It directs the railroad carriers to permit delivery of their cars to Seatrain and to establish, observe and enforce rules, regulations and practices with respect to the interchange of cars corresponding to the Code of Per Diem Rules, but makes no requirement that Seatrain observe the rules, including that requiring return of cars, or make the payment, and is not conditioned upon any performance by Seatrain. Compulsion is imposed upon the railroads only. Seatrain retains full freedom of action.

and may refuse any performance without violating the order.*

The railroads' petitions for modification of the order so as to make it run against Seatrain as well as against the railroads (R. 1340-71) were denied (R. 74-75). The Commission even refused to make a finding as to the manner in which settlement should be made, saying that this would "be left to the intervener, Association of American Railroads" (R. 71). The Commission's order is futile in attempting to transfer to a voluntary organization the burden of prescribing and enforcing the manner of settlement. This is not the performance of the function required of an administrative body. See *U. S. v. Chicago, Milwaukee, St. P. & P. R. Co.*, 294 U. S. 499, 510 (1935).

The Commission, in its answer filed in the District Court, sought to justify its failure to direct Seatrain to pay any amount found to be reasonable (Pet. Par. XXX, R. 17) by claiming as follows: (a) The order "is a cease and desist order"; (b) it requires defendants to permit the delivery of their cars to Seatrain "only upon the condition that defendants are paid [the] reasonable compensation" of $1 per day; and (c) Seatrain cannot be compelled by the Commission to pay directly to the railroads as, by the Car Service and Per Diem Rules and Agreement, the railroads will accept payment only from a railroad which is a party to the agreement (Answer, Par. XVIII, R. 94-95).

* The Commission made its order and refused to make any direction against Seatrain, although it knew that not one of the connecting railroads at Hoboken had succeeded in obtaining a settlement of the per diem from Seatrain or the Hoboken from 1933 to at least April, 1941, and that at the time of the order, no settlement had been made with the Pennsylvania. (R. 799, 1334, 68; see p. 66, note, *infra*).

The attempted excuse indicated in (a) is purely rhetorical. It does not follow that even if it had limited its order to a direction to "cease and desist" the Commission could have escaped its obligation to afford the railroads the protection required by the Constitution. Moreover, the order directs affirmative action by the railroads, viz.: the establishment of rules, etc. (R. 73-4). There is no reason why, by reason of the nature of the order, reciprocal action should not have been required of Seatrain.

As to the matter urged in (b) in vindication of its order, the Commission expressed no such "condition", and denied an application for modification or clarification of the order so as to make it ran against Seatrain as well as against the railroads (R. 74-75; 1340-60, *l. c.*, 1356, 1360, 1371). Furthermore, the Per Diem Rules do not require prepayment, but under Rule 11 (R. 471), which by the order is to be applied by the railroads in dealing with Seatrain, the per diem reports are not required to be made by the owning railroad carrier until 40 days after the end of the calendar month with regard to the cars used during that month. The "condition", if it exists, does not furnish the assurance of compensation that is required when property is taken *in invitum*.

The reason indicated in (c) for the lack of power, is equally untenable. It is true that the Commission has no power to regulate the use of cars by a water carrier, or the compensation to be paid for such use, as such power is limited to use by carriers by railroad, Sec. 1(10)(13). Lack of the Commission's power rests upon this and not upon any provision of the Per Diem rules. The Commission has assumed power to require departure from the rules by directing the railroad carriers, in the case of transactions with Seatrain (R. 73-4), to abstain from enforcing Car Service Rule 4 (R. 453), and by relieving Seatrain from payment in accordance with Per Diem Rule 15 (R. 479). Conditioning the requirement of performance by the rail-

road carriers is made even more important by the Commission's self-asserted lack of power to "require Seatrain to pay per diem to them" (the owners)*.

Irrespective of why the Commission lacks power to compel Seatrain to compensate the railroads, such lack of power would not justify taking the railroads' property without insuring proper compensation. On the contrary, its effect is to destroy completely the Commission's jurisdiction to make the order under review. It requires no argument that the provisions of the Fifth Amendment to the Constitution are not met when property is taken by the act of a governmental agency which lacks the power to require compensation to be made.

Not only does the order fail to direct Seatrain to pay for the use of the cars, but it also fails to make provision for their return by Seatrain. This objection to the order (Pet. Par. XXX, R. 17) was met by the Commission by the plea we have already discussed with relation to the failure to require payment, that the order "is a cease and desist order * * *." (Ans. Par. XVIII, R. 94-5). Whatever the nature of the order, and irrespective of whether Seatrain may be willing to "move in the home direction cars which it has moved in the opposite direction under load" (R. 65), the fact remains that Seatrain is placed under no compulsion to return cars to their owners. This fatal defect in the order is inherent in the fact that the return of cars can be enforced only as against railroad carriers. Sec. 1(10), (14). Its only result, however, is to deprive the railroads of the protection required by the Constitution when their property is taken, and, therefore, to render the order void.

* The Commission's premise that, under the Car Service and Per Diem Rules, railroads "will accept payment only from a railroad which they permit to become a party to said agreement" (R. 95) is contrary to the fact. The provision that the railroads will accept settlements from subscribers only is Per Diem Rule 6 (R. 46) which, by its prefatory note "applies only to cars interchanged within Canada, Cuba, or Mexico."

The order in imposing unilateral obligations on the railroad carriers to permit Seatrain to use their property without imposing any correlative duty on Seatrain, is an arbitrary exercise of power and deprives them of their property without due process of law in violation of the Fifth Amendment.

In *Louisville & N. R. R. Co.* v. *Central Stock Yards Co.*, (1909) 212 U. S. 132, 144, Mr. Justice Holmes, speaking for this Court, in holding that a state constitution violated the Fourteenth Amendment, said that a law requiring interchange of cars with another for through traffic "could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use."

In *Brewster* v. *Rogers Co.* (1901), 169 N. Y. 73, the Court of Appeals of the State of New York held (pp. 80-81):

> "It was settled early in the history of this state that when private property is taken for public use, compensation need not necessarily precede the appropriation; but it was also settled that where payment does not precede appropriation, it must be secure and certain. (*Bloodgood* v. *Mohawk & Hudson R. R. Co.*, 18 Wend. 9). The responsibility of the state or of one of its municipal corporations or political division is deemed sufficient, but a fund to be raised solely from a local assessment district of limited area 'is not a sure and adequate provision, dependent upon no hazard, casualty or contingency whatever, such as law and justice require to meet the constitutional requirement' (*Sage* v. *City of Brooklyn*, 89 N. Y. 189). It is clear, therefore, that the property owner cannot be relegated to the doubtful responsibility or solvency of a private corporation or of an individual. (*Bloodgood* v. *Mohawk & Hudson R. R. Co.*, supra.) * * *"

See also *Cherokee Nation* v. *Kansas Railway Co.* (1890) 135 U. S. 641, 658, 659, *Grand Trunk Ry.* v. *Michigan Ry. Com.* (1913) 231 U. S. 457, 470-471.

B. The Commission adopted the Railroad Code of Per Diem Rules, including the $1.00 per diem, as providing the reasonable rental for the use of freight cars, and then relieved Seatrain from paying a substantial but undetermined part thereof, without other essential basic findings.

Assignments of Error 12, 13, 16, 19, 21, 27-29, 32 (R. 157-162).

By its order the Commission has required the railroad carriers to establish, observe and enforce "rules, regulations and practices with respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc., in interstate commerce corresponding with the current Code of Per Diem Rules governing the interchange of freight cars between said defendants and other rail carriers, including the current rate of $1 per car per day"; but, unlike the requirement for railroad carriers among themselves, has provided "that such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession." (R. 73, 74)*

*The decision was the subject of a sharp dissent by 5 of the 11 Commissioners. See dissenting opinion of Commissioner Lee, and of Commissioner Patterson in which dissent Commissioners Mahaffie, Rogers and Alldredge joined (R. 72):

"Whether Seatrain is a railroad or, as the majority found, a water carrier, it cannot successfully operate except by transporting freight in railroad cars. It owns no cars, and we are here requiring defendants, against their will, to interchange their cars with it. We should not require defendants to make such interchange on less favorable terms and conditions than those on which they interchange cars with each other. Seatrain, as the majority has found, should pay the same daily rate of rental as the railroads pay each other. A railroad that is unable to accept a car from its rail connections pays the car rental which accrues because of its inability to accept such car. Seatrain should do likewise. In other words, so far as responsibility for car rental is concerned, Seatrain should be treated exactly the same as the line-haul rail carrier, receiving all of the privileges and assuming all of the responsibilities that the railroads receive or assume in their relation with each other."

See to the same effect the examiners' reports (R. 1035, 1298).

It is manifest that if the reasonable amount to be paid for the use of property is to be fixed on a per diem basis, two factors must be correctly established, viz: the reasonable value per day, and the number of days of use.

The Commission found that the reasonable compensation for the use of a freight car was the amount prescribed by the Code of Per Diem Rules governing the interchange of freight cars between rail carriers (R. 143-146, Dist. Court Findings 1, 2, 3, 4 and 8). The Commission stated the purpose of the complaint before it was "to permit" Seatrain "to use railroad cars owned by others upon terms comparable with those available to railroad carriers generally" (R. 68), and said:

> "We have found that it is entitled to the privilege of such use, and, on the theory stated above, it should also be willing to assume the obligations incident thereto." (R. 68-69, 145-146)

The obligations of railroad carriers generally, which Seatrain should have been "willing to assume," were those prescribed by the Code of Per Diem Rules, (R. 141) which provided for the payment of a per diem rate of $1 per car per day (Rule 1, R. 463) from the time the cars are made available (Rule 15, R. 479).

The Commission then made the statements, or findings, whichever they may be, that the tariffs of the Lower Coast provided that it would receive cars for movement over Seatrain only upon the latter's written order, and not before the day prior to the sailing date, and that "the detention being one attributable to Seatrain's mode of operation, on this view of the matter defendants should not be compelled to assume the cost of this detention" (R. 69).

The opposing view there alluded to, and thereafter expounded (R. 69), does not affect the determination appearing in the foregoing, that the reasonable value of the use of the cars by Seatrain must include compensation for the number of days of detention. It merely sets forth a

apparent analogy between "the burden which they [the owning railroads] would bear on traffic interchanged with Seatrain if the latter should pay per diem only when the cars are in its actual possession," and the "burden through car detention," which they bear "on traffic interchanged with break-bulk lines." The analogy is non-existent, for a break-bulk carrier, as the Commission said (R. 68), "does not have occasion to use railroad cars and accordingly is not required to pay per diem rental." However that may be, the Commission concludes on the strength of the supposed analogy, that as the detention of cars in connection with transportation by a break-bulk water carrier "is reflected in the demurrage rules and also, presumably, in the rail rates and divisions applicable to such traffic," the compensation of the railroads for the use of their cars during the period of detention "is a matter for consideration in connection with these rates and divisions, rather than in determining the per diem rates which Seatrain should pay" (R. 69). The Commission left such adjustment for the future.

The effect of this, as stated by the District Court (R. 141) is as follows:

> "The Commission thus has relieved Seatrain of the obligation to compensate the petitioners for the period of time during which a car may be held by Seatrain's connecting railroad carriers because there is no ship immediately available to receive the car at Hoboken or at Belle Chasse. The nature of this exception in Seatrain's favor is made plain by an examination of Rule 15 of the Car Service and Per Diem Agreement of the trunk line carriers."

The pertinent provision of Rule 15, as quoted by the District Court (R. 141), is:

> "(a) A road failing to receive promptly from a connection cars on which it has laid no embargo,

> shall be responsible to the connection for the per diem of the cars so held for delivery, including the home cars of such connection."

Thus, the Commission has found that payment of $1 per day only for such period as the cars are in Seatrain's actual possession does not afford full compensation to the railroads for Seatrain's use of their cars, but has nevertheless ordered the railroads to surrender their cars to Seatrain limiting the trunk line connecting carriers to such admittedly inadequate compensation.

The vice of this situation is not met by relegating the railroads to a possible adjustment in some future proceeding.

The petitioners may not, under the Constitution, be deprived of the use of their cars today in the hope that adequate compensation in the form of divisions may be accorded to them at a more convenient time hereafter.*

> "This was not a full discharge by the Commissio of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come." Mr. Justice Cardozo, speaking for the Court in *U. S. v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, at p. 510.

The rule as to compensation for compulsory taking of property has been stated by this Court as follows:

> "* * * the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed." *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. 641, 659.

To the same effect, with respect to the taking of prope

* The divisions case, *Seatrain Lines, Inc. v. Akron, Canton & Youngstown Ry. Co.*, is now pending, unheard and undecided before the Commission, Docket No. 28668.

erty for temporary use, this Court has said that the owners

> "* * * are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking." *Phelps* v. *United States*, 274 U. S. 341, 344.

See also, *Brewster* v. *Rogers Co.*, 169 N. Y. 73 (p. 56, *supra*).

The order of the Commission in the instant case violates the rule recognized and enunciated in the foregoing decisions, and thereby deprives the connecting railroad carriers of a constitutional right.

The order cannot be justified, as the District Court attempted, by saying "that the determination of the per diem rate and of its method of application rested with the Commission in the exercise of its expert administrative judgment" (R. 142). When the Commission, by its order, directed the railroads to turn over their cars for Seatrain's use at the daily rate found reasonable, but limited the compensation to only a portion of the time employed in such use, it deprived the railroads of their property without just compensation.

The impact of the order upon certain of the petitioner railroad carriers may now be examined.

Petitioners Texas & New Orleans Railroad Company (a Southern Pacific System line), Louisville & Nashville Railroad Company and Southern Railway Company operate trunk line railroads connecting with the Lower Coast at New Orleans (R. 805-6, 130). The Lower Coast, an affiliate of Seatrain (R. 130, Dist. Court Finding 5), will not, under its tariff, receive cars from connecting railroads for movement over Seatrain, except upon written orders from Seatrain, and then only the day before the sailing date (R. 145, Add'l Finding 5). Accordingly, if one of the said railroad carriers owns the freight cars it suffers the loss of the value of their use during the period of time after

they are made available and before Seatrain sees fit to accept them. If, on the other hand, the cars so detained on its line belong to another, it must pay out of its own pocket to the owner the $1 per diem for the said detention, not for its own purposes, but for the sole use and benefit of Seatrain (R. 65-67).

During a test period such detention on the connecting lines at Belle Chasse averaged 3.3 days per car for each trip (R. 145, Dist. Court Add'l Finding 6; R. 67, 68, 812). The voyage requires on the average 6 days (R. 121). The car, therefore, is used approximately 9.3 days solely for the benefit and profit of Seatrain. By the Commission's order (R. 73-74) Seatrain can not be charged more than $6 for such use and escapes the payment of $3.30, which in turn must be paid to the owner by the railroad carrier on whose line the car is required to be detained, or if said railroad carrier happens to be the owner, it must suffer the loss of the rental during that period. On this basis, Seatrain pays only approximately two thirds of the amount paid by a railroad, yet Seatrain is given the benefit of the $1 per diem solely because that is the prescribed compensation for settlement by the railroads among themselves. Moreover, the free use obtained by Seatrain of the cars detained at the port, the cost of which must be absorbed or paid by the said railroad carriers, is not limited by the order to the 3.3 days found to be the average in the period tested.

There is absolutely no limit except Seatrain's unrestrained discretion with respect to the amount of free time it may take (R. 73, 74). Thus Seatrain is relieved of the results of any failure or inability to carry the cars promptly, the indefinite or uncertain burden of which is wholly imposed upon said petitioner railroad carriers.

The Commission has made no finding that such detention is any part of the railroads' duty to the shipper. On

the contrary, it expressly recognized that the delay is inherent in Seatrain's service (R. 67, 69). It stated "Seatrain contends that its inability to receive cars promptly must be regarded as inherent in the nature of all water lines, which ordinarily have a limited number of sailings and are therefore unable to provide as frequent service as a railroad" (R. 67).

The order offers no protection to the connecting carriers in any respect. There is no rational basis in the findings of the Commission or in the record for relieving Seatrain from paying for the cars during the time of their detention at the port.*

In *Chicago R. I. & P. Ry. Co. v. U. S.*, (1931) 284 U. S. 80, this Court held that an order of the Commission, compelling line haul railroad carriers to allow two days free time in the per diem to be paid by their short line connecting carriers, was arbitrary, unreasonable and in violation of the railroad carriers' constitutional rights. The dissenting opinion pointed out that in that case the short line carrier was engaged in origin or destination terminal services which were an aid to the main carrier; that the stated per diem was found by the Commission to be unfair to the short line carriers without the two days' free time in view of the service they rendered to the trunk lines, and that the Commission's finding was supported by evidence and demonstrated that the short lines were being compelled to bear a disproportionate part of car hire costs. There is no such showing here. Seatrain is engaged in the line haul, and the unlimited free days of detention were extended to Seatrain for reasons having no relation to car hire.

In extending to Seatrain free rental for an indefinite period of time, because break bulk lines also cause car

* We are not here concerned with the question whether the Commission's findings could be construed as allowing a deduction of 10c per day while the cars are on Seatrain's ships. Such a deduction would not compensate for 1 day's detention much less the average of 3.3 days or the unlimited number made possible by the order.

detention, the Commission failed to adopt the rational basis required of administrative bodies whose determination Congress has made subject to judicial review. *Rochester Tel. Corp. v. United States*, (1939) 307 U. S. 125, 145, 146; *Interstate Commerce Comm. v. Jersey City*, (1944) 322 U. S. 503, 513.

The only reasons advanced by the Commission for relieving Seatrain from the obligation of paying for the use of the cars to the same extent as railroads pay generally and found by it to be reasonable, are the attempted analogy to break-bulk carriers (R. 69) referred to above (pp. 58-9, *supra*) and the assertion that some of Seatrain's line haul connections "have agreed to this method" (R. 69-70, 145).* The treatment accorded by railroads to shippers or break-bulk carriers has no relevancy in determining the reasonable value of the use of a freight car.

Seatrain owns no cars (R. 64). Since it owns no cars it must hire them from some one. If it takes them from the railroads it must pay rental for their use. If it rented them from a manufacturer it would have to pay the full rental. If it bought them from the manufacturer it would have to pay the full purchase price. In neither event would it be relieved from paying a portion thereof, because of its competition with a break-bulk carrier, for the reason that its relationship with the break-bulk competitor has no more bearing on the value of the use of a freight car than of the use of a taxicab. Seatrain has been relieved from paying the reasonable value of the use of the freight cars because of extraneous matters which have no probative force as to car hire.

Not only is there no interchange of cars with break-bulk carriers nor any car rental involved, but, there is no compulsory detention of the cars containing freight to be shipped by break-bulk shippers. The railroad carriers may unload their cars at any time they desire (R. 67-68, 1120, 1125-26). There is accordingly no basis for compar-

* See Dist. Court's Add'l Findings 9 and 10 (R. 146).

ing the right of the railroads to unload their cars at any time in their dealings with the break-bulk carriers, who never rent them, and the rental to be paid by Seatrain wherein the cars may not be unloaded by the railroad carriers, but must be held for Seatrain without time limitation.

Moreover, by granting an unknown and unlimited number of days during which the cars may be detained by Seatrain at the port without cost to it, the Commission's order has made it impossible to make a division of rates in the future so as to provide fair compensation for this unknown and unlimited number of days. Even the past can be no guide for the future because the rule tending to discourage unnecessary days of detention has been suspended for the benefit of Seatrain. It was generally understood that, in order to prevent unnecessary detention, car hire costs would never be considered in fixing divisions. *Chicago R. I. & P. Ry. Co. v. U. S.*, 284 U. S. 80, 108-109. This was in accordance "with the unvaried practice of the trunk lines, whose traffic and transportation departments have customarily kept divisions and car hire rigidly divorced." (*Ibid.*, p. 124).*

Compelling the said petitioner trunk lines to absorb or pay for the unlimited detention caused by Seatrain has no warrant in the record. The Commission's extension to Seatrain of all of the benefits of a railroad carrier while relieving it of the burdens adjunctive thereto has no basis in fact or law.

Equally without merit is the other consideration which

* In Ex Parte No. 96, 174 I.C.C. 477, 478, Commissioner Eastman, speaking for the Commission, said:

"* * * but the barge line urges that per diem at ports of interchange is part of the through traffic arrangement and must be taken into consideration in fixing equitable divisions. We regard the subject of car-hire settlement as distinct from that of divisions of joint rates, and this distinction is reflected in the interstate commerce act. Section 1 (14) of that act in connection with our jurisdiction over car service gives us power, after hearing, to prescribe the compensation to be paid for car hire. Our power to fix divisions of rates is derived from section 6."

seems to have impelled the Commission to direct railroads to turn over their cars to Seatrain without compensation for the days of detention by Seatrain. No alleged agreement with other carriers can have any materiality. If they have chosen to waive payment of the amounts which, under the Commission's report, would be necessary to afford full compensation, that does not warrant the Commission in denying such compensation to the petitioners who are compelled to surrender their cars to Seatrain at New Orleans.

> "Just as an owner may sell his property for less than the amount he would be entitled to have upon expropriation, so may carriers, conditions warranting it, render service for less than, by exertion of sovereign power, they could be compelled to accept."
>
> *B. & O. Railroad* v. *U. S.*, 298 U. S. 349, 358.

Moreover there is no evidence to sustain the statement of the Commission (R. 69-70) that "Seatrain's line-haul connections at Hoboken have agreed to this method," that is, to charge Seatrain per diem only for the period that the cars are in the actual possession of Seatrain with the privilege of unlimited free time at the port. The alleged agreement was not placed in evidence and the full terms and conditions thereof were not stated. Indeed, it was admitted that perhaps the agreement was only in the process of negotiation (R. 1330 ff). The chief basis of the negotiation, to wit, the consideration to be received, was not disclosed. However, if the connecting railroad carriers at Hoboken preferred less than just compensation to no compensation at all* that is no reason why the connecting carriers at

* Witness Randall, testifying on March 1, 1939, stated (R. 799): "* * * No per diem or reclaim settlements have been made as between Hoboken on the one hand, and Central of New Jersey, D. L. & W., Erie, Lehigh Valley, New York Central, or Pennsylvania on the other, since 1932 or 1933."

That no settlement of per diem had been made with any of the rail connections at Hoboken prior to April 1941 is shown by Ex. 87 (R. 1334, 1330).

New Orleans should be required to accept less than reasonable compensation. But it is more important that it did appear, affirmatively, from the correspondence that the free time allowed by such carriers was to be limited (R. 1333, 1336), in contrast with the unlimited free time afforded Seatrain by the Commission's order.

Having determined that the reasonable compensation for the use of a freight car was $1 per day, and that the full amount ought to be payable by Seatrain (R. 68, 69, 145-146) and not be assumed by the railroad carriers (R. 69), the Commission has required the railroad carriers to devote their cars to Seatrain's use without providing for compensation for the actual use. The vice in the Commission's order, in this respect, is not in the failure to adopt an appropriate standard to measure reasonable compensation, but in refusing to permit the railroads to charge Seatrain the compensation, for the use of a freight car, determined to be reasonable.

If, as we submit, the Commission has found that the compensation provided by the Code of Per Diem Rules for the interchange of cars by railroad carriers with each other is just compensation, then the order should be set aside for the reason that Seatrain has been relieved from paying a substantial part thereof and the order fails to provide the just compensation required by Congress, Sec. 1(14)(a) of the I.C.A., and guaranteed by the Fifth Amendment.

If, on the other hand, the Commission has not adopted the Code of Per Diem Rules as reasonable compensation, it has not made the basic findings essential to support its conclusory statement of the amount Seatrain should pay. The ultimate finding or conclusion of the Commission (R. 71), does not suffice in the absence of basic findings upon which the conclusion is based. *U. S. v. Carolina*

Freight Carriers Corporation, (1942) 315 U. S. 475, 488, 489; *Florida* v. *U. S.*, (1931) 282 U. S. 194, 215; *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, (1935) 294 U. S. 499, 504, 506, 510, 511; *Baltimore & Ohio R. Co.* v. *U. S.*, (1937) 22 Fed. Supp. 533; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, (1942) 315 U. S. 575, 586.

In short, there is no justification in law or fact for the provision in the order that the said connecting railroad carriers shall require payment of the per diem "only for such period as the cars are in its [Seatrain's] actual possession," and as this is an essential, inseparable part, the order should be set aside in its entirety.

C. The basic per diem rate of $1 for a freight car compulsorily supplied to Seatrain has no support in the record, is less than the cost of car ownership, and is confiscatory.

Assignments of Error 20, 24, 25, 28, 29 (R. 160-2)

For the purpose of the prior argument we have assumed that there was warrant in the record for fixing the per diem value of a car at $1 per day for Seatrain's use, and, upon that assumption, submitted that the order was confiscatory because it did not apply that rate to the full number of days during which the owners were deprived of their property. The inadequacy of the per diem figure, and the resulting confiscatory nature of the order will now be shown.

The statements in the Commission's report which may be considered as findings of the basic per diem value are few, and may be repeated here.

The Commission stated that defendants

> "* * * show that a car in general railroad use spends an average of only 1 day in 'active and productive service' out of a period ranging, in accord

ance with the definition of such service, from 3.82 to 19 days." (R. 64).

It then states the conditions to which the varying figures apply. It suffices to quote their statement concerning the shortest period, viz.:

> "If [such service] * * * includes the time which elapses between placement of the car for the consignor and release of the car by the consignee, 1 out of 3.82 days is so spent." (R. 64).

In other words the car is in productive service only for some 95 and a half days in the year.

The Commission then said:

> "As heretofore stated, we found in Rules for Car Hire Settlement, supra, that in 1925 the full cost of ownership and maintenance was, on the average, approximately $1 each per day for the periods in which the cars were actually in service, not including the time they were idle because of lack of demand or unserviceable condition. The record indicates that the present cost does not exceed that amount." (R. 64).

The prior finding referred to, and quoted in the report (R. 62) was as follows:

> "The per diem rate is supposed to reflect the average cost, to the owner, of freight car ownership and maintenance, and embraces cost of repairs, cost of taxes, cost of replacements, miscellaneous expenses, and 6 percent interest on the investment. From the evidence of record, it is estimated that the cost of car ownership and maintenance averaged 83.812 cents per car day and $305.91 per car unit in the calendar year 1925, and approximately $1 per car day in that year for the periods cars were actually in service. Cars were idle a portion of the year, due in part to unserviceable condition, and in

(part to the fact that the supply of cars exceeded the demand.'"

After further discussion of the contentions of the parties the Commission said:

> "In all of the circumstances, we find no good reason why Seatrain should pay a higher per diem rate than the $1 now applied uniformly by the car-hire rules, especially when the record shows, and it is admitted, that the cost of maintaining the cars is decreased approximately 10 cents per day while they are in its possession" (R. 66).

Nowhere else in the record is there any language which may be construed as a finding of the basic value to the owner of a car during its use by Seatrain; other findings, previously referred to, relate to whether the basic rate should be paid during Seatrain's detention of the car.

The defendants in the District Court there denied that some or all of the language quoted above constituted findings. In either event, the result is the same.

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* To comprehend the difference between the 83.812¢ average cost of ownership and the $1 for periods of actual use, see the closely similar figures for 1939 and 1940 (R. 1261). Thus, using interest on depreciated reproduction value, the cost for 1939, taking no account of bad order and surplus cars, was 79.441¢ per day, while taking those cars into account it was 99.458¢ per day.

The items break down as follows:

Repairs	Taxes	Interest on Depreciated Value	Depreciation and Retirements	Miscellaneous charges	Total Cents
27.290	5.966	19.993	16.893	9.299	79.441

If interest be calculated on the investment, the figures were substantially higher (R. 1261).

The cost of maintenance and repair items alone of the Lower Coast were shown to be 27 1/2¢ per car per day (R. 931) as against the 27.290¢ in the estimate of the Association of American Railroads.

The cost of car ownership by the petitioner Southern Railway Company was separately shown to be 82¢ per car per day without taking into account the return of empties, which would bring the figure above $1. (R. 723-730).

If they be deemed findings, the compensation fixed is shown thereby to be less than the cost of car ownership and confiscatory. If, on the other hand, they are not findings, then there are no adequate basic findings to support the order with respect to compensation. If in the absence of appropriate findings by the Commission and the District Court this court should examine the evidence, the order will be found to be confiscatory and to deprive the railroads of their property without due process of law. In any of said events the order should be set aside.

1. *Nature of the railroad per diem rate.*

Assignment of Error 20 (R. 160-161).

It appears from the report, as quoted above, that the $1 per day was based on a finding that the cost of car ownership and maintenance was $305.91 a year, or 83.812c (1/365th thereof) for every day in the year. Allowing for idle time due to unserviceable condition and excess of the supply over the demand during a year, the cost in 1925 was fixed at $1. per car per day (R. 64) No consideration was given to the other unproductive days of a car in serviceable condition, particularly to the number of days for which the owning railroad receives no compensation, and their proportion to the days which are productive of revenues.

The application of the $1. per diem to Seatrain would be an appropriate method of determining compensation only if Seatrain were renting the cars on an annual basis, or if railroad cars were earning income substantially every day year in and year out, or, possibly if Seatrain were a contributing participant in the cooperative pool in which it was bearing all of the other burdens of car ownership and rendering the reciprocal service required of the members.

But Seatrain is not renting cars on an annual basis; cars cannot earn income every day in each calendar year

(even when not withdrawn from service because of unserviceable condition or excess of supply over demand during the year), and Seatrain is not directed to bear the burdens of car ownership (R. 73).

2. *Active use of the car during the calendar year.*

Assignments of Error 17, 18 (R. 159).

We have previously quoted the statement of the Commission to the effect that a car in general railroad use spends an average of only 1 day in "active and productive service" out of a period ranging in accordance with the definition of such service, from 3.82 to 19 days. (pp. 68-9, *supra.*)

As previously stated, it is of little moment whether that is a finding. The difficulty in recognizing and distinguishing findings from argument in the Commission's report is admitted. It has labeled as findings only its ultimate conclusions (R. 71), and not the basic findings, if any there be, necessary to sustain its order. See *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499.* However, it seems clear that the Commission was careful in its report to distinguish contentions of the

* The Commission's report falls within the condemnation of this Court, speaking through Mr. Justice Cardozo in that case, where he said, at p. 510:

> "We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. * * * The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86; *Florida* v. *United States*, 282 U. S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

parties from facts which are established, as it referred to arguments as "defendants contend", "they urge", "defendants argue" (R. 63-64). But in the paragraphs above quoted the Commission states that the defendants "show". If this was not a finding, it should have been, for it is material and fully supported by uncontradicted evidence received without objection (R. 790, 808-818).*

The unproductive days, in addition to those due to lack of demand or unserviceable condition which alone were considered in fixing the $1 rate, include those when the cars "are hauled empty, when they are being conditioned and placed for loading". (R. 63-4).

It is thus seen that the $1 rate applicable to railroads is predicated upon the assumption that each of the line-haul railroads, parties to the agreement to abide by the Car Service and Per Diem Rules promulgated by the Association (R. 973), will bear an equitable proportion of the expense of owning and maintaining the country's

* Randall, an officer of the American Association of Railroads, testified in part as follows (R. 815):

"Q. Have you any figures that indicate the proportion of the total time of a car that it spends under load, using the term, 'under load' with a particular significance—and it may be used with a different significance. I mean now—take the time between the placement of the car for the consignee to load it and the release of that car, and we will call that inaccurately for this purpose 'loaded time.' What part of that time—what part of the total car time is that time which I have called 'loaded time'?

"A. It is less than one-third of the time.

"Q. In other words, how many total car days are there in railroad operation to one car day of the kind that I have described, and called loaded time, meaning now the time between the placement for the consignee and the release?

"A. Approximately 3.82.

"Q. 3.82 total days for one such day?

"A. That's right.

"Mr. McCollester. Just let me be sure I understand. Is it 3.82—is that the total days, including the one day?

"The Witness. Yes, sir.

"Mr. McCollester. In other words—oh, I see, all right. That's right."

See also R. 816-818.

car supply. All railroads performing line-haul service may not own cars in precise proportion to their use in any one month; but a general equitable distribution of the cost of providing cars is accomplished through the payment by railroads of per diem on cars not owned by them. It has long been recognized by the railroad carriers, the Commission and the courts, that the $1 per day from the date the car is held for delivery, "admittedly but a rule of thumb" and not full and "accurate compensation", has been a convenient figure in settling accounts among railroads, and that with a proper balance of car ownership, debits and credits for car hire would equalize themselves.* Yet the Commission has found that Seatrain may participate, on the receiving end, in the car pool and obtain all of the benefits therefrom without even paying its share of the resulting expense, or without making a capital investment with respect thereto, and as we have seen, without even paying the per diem for all of the time the car is held for its use.

If the Commission did not intend the statement with respect to the days that freight cars are in productive service (pp. 68-9, *supra*) as a finding, it has failed to make any finding of the proportion of such days in the year when a car is productive and the proportion of days that it is unproductive. Yet such a finding is essential to determine the cost of the car to the owner and the reasonable rental to be paid by a company such as Seatrain which owns no cars and which uses them only on the most productive days.

The Commission, implicitly at least, admits that the $1 per day does not compensate the owner for the time consumed in placing the cars for loading and unloading.

* *Chicago R. I. & P. Ry. Co. v. United States*, 284 U. S. at p. 108, footnote 9, 111, 112; *Burton Stock Car Co. v. Chicago, Burlington & Quincy R. Co.*, 1 I.C.C. 132, 140; *Virginia Blue Ridge Ry. v. Southern Ry. Co.*, 96 I.C.C. 591, 593; *Lake Erie & Ft. Wayne Railroad Company*, 78 I.C.C. 475, 489; *Marcellus & Otisco Co. v. N. Y. Central R. R. Co.*, 104 I.C.C. 389, 392.

etc., and that as between the railroads this burden is distributed by the general ownership of cars (R. 64).

3. *Seatrain is not required to and does not contribute to the car supply of the country.*

Assignments of Error 15, 19 (R. 159).

The Commission stated (R. 64): "As aforesaid, Seatrain owns no cars." However, recognizing the weakness of its position, it also says (R. 65): "it appears also that Seatrain rents a substantial number of privately owned cars." In so far as this may be deemed an intimation or finding that Seatrain has rented cars for interchange and thereby contributes to the car supply for that purpose, it is without evidence to support it. Seatrain's evidence is to the contrary.*

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* Ballantine, a witness called by Seatrain, testified as follows (R. 240-1):

"A. Seatrain Lines, Inc. not yet having provided any cars for use in through service, has to assume the per diem on all its traffic, whereas on business interchanged between two rail carriers involves the expense of cross-hauling empty cars previously referred to. Therefore, when roads deliver a car to Seatrain they are going to be paid per diem and Seatrain is not going to load any of its cars to them, necessitating special effort on their part to avoid payment for their use.

"Q. In other words, there is no reciprocal feature attached to it.

"A. No, there is no reciprocal feature."

* * * * *

"A. Yes; as between railroads there is a reciprocal feature in per diem payments; as a whole the payments equal the receipts. Seatrain only pays per diem as it has no cars to rent."

A Hoboken official (MacGowan) on direct examination testified that 60 cars belonging to other railroads, were held on the Hoboken at $1 per day (R. 905). But after considerable cross-examination and after inquiry from the Examiner whether 60 was the exact number, the witness admitted that 60 was an abnormal number and the customary number was 20, and that these cars were held purely for the local business on the Hoboken line for Seatrain and not interchanged with the trunk lines on the through routes or otherwise (R. 925-7). It thus appears that these cars are not contributed by Seatrain to the car supply for general interchange.

There is apparently no contention that Seatrain either owns or rents any general freight cars which can be deemed a contribution to the car supply available for interchange purposes and any findings by the Commission to the effect that Seatrain rents or otherwise supplies line cars for interchange with railroad carriers is without evidence to support it.

The urging by Seatrain (R. 15; 101, 102, 1074-1078) that the supply during 1933-1934 was excessive, does not affect the situation, whether that were the fact or not. Such argument ignores the fact that the requirement of freight cars is not constant, either as to kind or as to seasons or as to years. So long as the quantity of the various kinds of traffic is not constant from season to season, nor from year to year, there will be peak movements both as to seasons and as to years, and cars must be maintained throughout the 365 days at the peak, and likewise through the lean years. But this should give no special benefit to Seatrain since neither its requirements nor the directions of the order are limited to seasons or periods when there is a surplus.

Likewise, an alleged offer by Seatrain to acquire cars when that "is desirable from the standpoint of the car supply of the country" (R. 65, 144), cannot be substituted for the duty to pay to the owners a reasonable share of the actual cost of the cars which Seatrain uses, and does not afford to the owners the just compensation to which they are constitutionally entitled for the use of the cars taken without their consent.*

Equally futile as justification for its order is the Commission's statement that "as between railroads there is no such balancing of burdens * * *," as the car ownership is not equal (R. 65). Assuming that the trunk line rail-

* In the present state of the Commission's order if Seatrain were to furnish cars for exchange, Seatrain would receive from the railroads per diem from the time the cars are made available, while paying for cars it receives only while in its actual possession.

roads voluntarily, and not by direction of the Commission, subsidize the short lines which serve them as feeders, or receive less than full compensation from other lines, this would be no reason why the railroads should be compelled to act as feeders for Seatrain and pay for the privilege or be compelled to receive less than the full value of their cars. Moreover, the $1 per diem, even as "a rule of thumb," approximates compensation only when paid also during the time when cars are being returned empty. The Car Service and Per Diem Rules, which the Commission can enforce against railroad carriers, ensure such compensation to the railroads as between themselves, but as the Commission cannot, and has not attempted to compel compliance by Seatrain, this important element of just compensation is missing.

Likewise it makes no difference that some of the trunk-line railroads may have found Seatrain's operation of the service from New Orleans to Cuba, where the cars must be returned, a sufficient feeder to justify their voluntarily rendering car service in that respect at less than cost (R. 65-6). Voluntary conduct is no basis for compulsion, *Baltimore & Ohio R. R. Co.* v. *United States*, 298 U. S. 349, at page 358.

Seatrain's use of cars closely corresponds with the unit of rolling time in loaded line-haul movement, which would seem to warrant the use of the highest ratio in determining an appropriate rate therefor (see pp. 68-9, *supra*). However, since it is not the function of this court to fix an appropriate rate, but only to determine whether the Commission has followed the Congressional mandate to fix "reasonable compensation", Sec. 1(14)(a), and the constitutional requirement of just compensation, it is only necessary to point out that, given the ratio most favorable to Seatrain, there would still be only one day of active service

for which Seatrain pays to 2.82 days of unproductive time to which Seatrain makes no contribution. Since the car is earning only one day out of 3.82 days, the cost of ownership for each of such productive days is more than treble the 83.8¢ average for each day in the calendar year, or the 82¢ actual cost of petitioner Southern Railway Company (p. 70, *supra*). The cost of ownership would be $3.20 for each such usable day, or $3.10 after the deduction of ten cents a day alleged to be saved by the fact that the cars are not moving on Seatrain's ships (R. 144-5).* Even if the interest on value (p. 70, *supra*) were eliminated the compensation fixed would still be less than the actual cost to the said railroads.

The plight of the railroads may be illustrated by that of the Southern Railway Company. With a minimum cost per use day of $3.20 (or $3.10 after deducting the ten cents) it loses that amount of car rental for each day that it holds the car for Seatrain's benefit, receiving no compensation from Seatrain either in reciprocal service or otherwise, and suffers the loss of the difference between $3.20 and $1. per day for the days its cars are in Seatrain's actual possession.

If the statements, with respect to the actual cost per calendar day and the number of days of productive use of the car during the year, are findings, it is readily seen that Seatrain has been permitted to deprive the railroad carriers of their freight cars without their consent and at a compensation less than the actual cost of car ownership of the said railroad carriers respectively. This is shown both by the Commission's said findings and by the evidence.

* It should be noted that the 10¢ is not to be deducted before applying the unit factor of 3.82, since the alleged saving is only for each day cars are on Seatrain's vessels and not for each of the days the car is idle or in unproductive service.

If, on the other hand, the statements of the Commission with respect to the actual cost of car ownership during the calendar year and the days of actual productive use during the year are not findings, then there are no basic findings to support the order. In either event, the order is purely arbitrary and has no rational basis in the record. See *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 145.

CONCLUSION

The order of the Interstate Commerce Commission of October 13, 1941, in Docket Nos. 25728 and 25878, as amended, is erroneous and beyond the lawful authority of the Interstate Commerce Commission and is void, for the reasons hereinbefore set forth, to wit:

1. The carriers by railroad are under no duty to furnish their cars, by interchange or otherwise, for the use of a carrier by water, such as Seatrain, and the Commission is without power to enforce any such alleged duty.

2. Independently of the foregoing, the provisions of the Interstate Commerce Act, requiring carriers by railroad to furnish and to interchange cars, are expressly limited to transportation which takes place within the United States, and, as the transportation by Seatrain invariably goes beyond the United States and its territorial waters, the petitioner railroad carriers should not be compelled to establish, observe, or enforce any rules, regulations, or practices with respect to interchange of cars for transportation by Seatrain.

3. The order deprives the railroad carriers of the use of their property without due process of law and without

the compensation prescribed by the Interstate Commerce Act and guaranteed by the Fifth Amendment, in that (a) Seatrain is under no direction to return the cars delivered under compulsion for its use, or to make any compensation therefor, and (b) the amount of compensation which the railroad carriers are permitted to charge for the use of their cars is less than the cost of car ownership, and is unreasonable and confiscatory.

For these reasons it is submitted that the order of the Commission should be set aside in its entirety and the judgment of the District Court modified to that extent.

Respectfully submitted,

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APPENDIX

Relevant Portions of Interstate Commerce Act.

NOTE: *The original Interstate Commerce Act and the various amendments thereto which are quoted hereafter are as follows:*

Original Act,	Feb.	4, 1887,	24	Stat. L.	387
Hepburn Act,	June	29, 1906,	34	" "	585
Mann-Elkins Act,	June	18, 1910,	36	" "	545
Esch Car Service Act,	May	29, 1917,	40	" "	101
Transportation Act of 1920,	Feb.	28, 1920,	41	" "	474
Transportation Act of 1940,	Sept.	18, 1940,	54	" "	898

Section 1, Paragraph (1)

SEC. 1(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment: * * *

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(As amended, 1940; unchanged from 1920 Amendment, except by substitution of "this part" for "this Act", and omission of application to "transmission of intelligence.")

Appendix

Section 1, Paragraph (2)

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States. * * *.

(As amended, 1940; unchanged from 1920 Amendment, except by substitution of "this part" for "this Act", and omission of application to "transmission of intelligence".)

Section 1, Paragraph (3)(a)

* * * The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported * * *.

(As amended 1940; unchanged from 1920 Amendment, except by substitution of "this part" for "this Act". The corresponding matter, as contained in previous acts, follows:)

Appendix

Original Act of 1887.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

Hepburn Act of 1906; this matter was unchanged by Mann-Elkins Act of 1910.

* * * The term "railroad", as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported * * *.

Section 1, Paragraph (4)

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reason-

able through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(As amended, 1940. The corresponding matter, as contained in previous acts, follows:)

Hepburn Act of 1906.

* * * and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

Mann-Elkins Act of 1910.

* * * and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the opera-

tion of such through routes, and providing for reasonable compensation to those entitled thereto.

(NOTE: *The matter in the last clause, "and to make reasonable rules, with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto" was omitted from 1920 and 1940 acts; "car service" was, by the Esch Car Service Act, and the 1920 and 1940 Amendments, provided for in what are now Section 1, paragraphs (10), (11), (13) and (14)*, q. v.)

1920 Amendment.

(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Section 1, Paragraphs (10) and (11)

(10) The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other

vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(As amended, 1940; unchanged from 1920 Amendment except by substitution of "this part" for "this Act". The corresponding matter, as contained in previous acts, follows:)

Esch Car Service Act of 1917.

The term "car service" as used in this Act shall include the movement, distribution, exchange, interchange and return of cars used in the transportation of property by any carrier subject to the provisions of this Act.

It shall be the duty of every such carrier to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service, and every unjust and unreasonable rule, regulation and practice, with respect to car service is prohibited and declared to be unlawful.

Section 1, Paragraph (13)

(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct

that such rules and regulations shall be incorporated in their schedules showing rates, fares and charges for transportation, and be subject to any or all of the provisions of this part relating thereto.

(As amended, 1940; unchanged from 1920 Amendment except by substitution of "part" for "Act". The 1920 Amendment, in turn, was substantially unchanged from the Esch Car Service Act in this respect, except that the 1920 Amendment substituted "all carriers by railroad" for "all carriers".)

Section 1, Paragraph (14)

(14)(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

(As amended, 1940. The corresponding matter, as contained in earlier acts, follows:)

Esch Car Service Act of 1917.

(Gave Commission power to establish rules, etc., with respect to car service; not necessary to quote.)

1920 Amendment.

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint,

establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicles not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.

Section 302, Paragraphs (i), (j), (k) and (l)

(i) The term 'interstate or foreign transportation' or 'transportation in interstate or foreign commerce', as used in this part, means transportation of persons or property—

(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States;

(2) partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only insofar as it takes place from a place in the United States to another place in the United States;

(3) wholly by water, or partly by water and partly by railroad or motor vehicle, from or to a place in the United States to or from a place outside the United States, but only (A) insofar as such transportation by rail or by motor vehicle takes place within the United States, and (B) in the case of a movement to a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein prior to transshipment at a place within the United States for movement to a place outside thereof, and, in the case of a

movement from a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein after transshipment at a place within the United States in a movement from a place outside thereof.

(j) The term 'United States' means the States of the United States and the District of Columbia.

(k) The term 'State' means a State of the United States or the District of Columbia.

(l) The term 'common carrier by railroad' means a common carrier by railroad subject to the provisions of part I.

(Added 1940, as a portion of Part III.)

Order of Interstate Commerce Commission of October 13, 1941, in Nos. 25728 and 25878.

These proceedings being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report on further hearing, containing its findings of fact and conclusions thereon, which said report together with the prior reports, 206 I.C.C. 328 and 237 I.C.C. 297, are hereby referred to and made a part hereof:

It is ordered, That the defendants listed in the appendix to said report on further hearing, according as they participate in through routes with complainants and Seatrain Lines, Inc., in interstate commerce via Belle Chasse, La., and Hoboken, N. J., be, and they are hereby, notified and required to cease and desist on or before February 2, 1942, and thereafter to abstain from observing and enforcing their present rules, regulations, and practices which

prohibit the interchange of their freight cars with complainants herein for transportation by Seatrain Lines, Inc., in interstate commerce.

It is further ordered, That said defendants, according as they participate in the through routes referred to in the next preceding paragraph, be, and they are hereby, notified and required to establish, on or before February 2, 1942, and thereafter to observe and enforce rules, regulations, and practices with respect to the interchange of freight cars with complainants for transportation by Seatrain Lines, Inc., in interstate commerce corresponding with the current code of per diem rules governing the interchange of freight cars between said defendants and other rail carriers, including the current rate of $1 per car per day; *provided, however*, that such per diem shall be payable by Seatrain Lines, Inc., only for such period as the cars are in its actual possession.

And it is further ordered, That this order shall continue in effect until the further order of the Commission.

By the Commission.

W. P. Bartel,
Secretary.